MAY 6 1971
E. ROBERT SEAVER, CLERK

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. [redacted] 70-55

BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM,
Appellant

v.

NEW LEFT EDUCATION PROJECT, ET AL.,
Appellees

APPPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

FILED DECEMBER 14, 1970
JURISDICTION POSTPONED MARCH 1, 1971

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CIVIL DOCKET
UNITED STATES DISTRICT COURT

A-69-CA-106

Jury demand date:

NEW LEFT EDUCATION PROJECT, CLYDE ALAN LOCKLEAR, NANCY SWEENY, JAMES CALDWELL, PATRICIA CUNEY, DAVID WADDINGTON AND LARRY NEIL WINN, Young Socialist Alliance, added by Court Order 2/10/70 Plaintiffs

vs.

BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM,

Defendant

BASIS OF ACTION: Alleged Deprivation of Constitutional Rights, Permanent Injunction.

(THREE-JUDGE)
Jack Roberts
Homer Thornberry
D. W. Suttle

ATTORNEYS

For plaintiff:
David R. Richards
205 Texas AFL-CIO Bldg.
308 West 11th St.
Austin, Texas 78701

For defendant:
W. O. Shultz
Assistant Attorney General
Box R, Capital Station
Austin, Texas 78711

DATE	PROCEEDINGS
8/ 1/69	1—Complaint filed Summons & Copy (with copy of complaint attached) Issued
8/21/69	2—Answer of the Deft filed
8/21/69	3—Motion for Preliminary Hearing filed
8/21/69	4—Brief in Support of Motion for Preliminary Hearing filed
8/21/69	5—Suggestion of Need for a Three-Judge Court filed
9/ 8/69	6—Summons Ret'ed & Ex on Frank Erwin by Keller DUSM on 8/6/69 $3.00 filed
9/ 9/69	7—Pltfs' Response to Defts' Motion for Preliminary Hearing
9/12/69	8—Order appointing Three Judge Court filed & ent'ed (Roberts, Suttle & Thornberry) copies of above order mailed to atty on both sides)
10/16/69	9—Order to furnish memorandum brief filed & ent'ed (copies mailed to Attys on both sides)
10/27/69	10—Memorandum Brief on Deft's First & Second Defense filed
10/27/69	11—Memorandum on the Necessity of a Three-Judge Court filed
11/ 5/69	12—Deft's Memorandum on the Necessity of a Three-Judge Court filed
11/ 7/69	13—Pltfs Response to Memorandum Brief on Deft's First and Second Defense filed
11/ 7/69	14—First Amended Complaint filed
11/ 7/69	15—Motion for Leave to Amend filed
11/13/69	16—Deft's Opposition to Motion for Leave to Amend filed
11/21/69	17—Memorandum in Support of Motion to Amend filed
11/26/69	Pltfs argument on Motion to Amend as to Joinder of Young Democrats Defts rebuttal. Defts argument on their Motion to Dismiss Pltfs rebuttal. Court will take matter under advisement
12/17/69	18—Memorandum Opinion and Order filed and ent'd (copies mailed to atty on both sides and 3 judges)
1/ 8/70	19—Motion for Leave to Intervene as Party Plaintiff filed (copies given to three Judges)
2/10/70	20—Order Granting Leave to Intervene (Young Socialist Alliance) filed and ent'd (copies mailed to attys on both sides and three Judges)

3/ 3/70	21—First Amended Answer of the Deft., Board of Regents of the University of Texas System filed (copies to three Judges)
3/10/70	22—Motion for Summary Judgment with attached affidavits of Gene Dolfi, Tom Kincaid & David R. Richards with Oral Deposition of Frank C. Erwin, Jr. & Edwin Booth Price filed
3/10/70	Copies of above motion mailed to the three Judges
3/18/70	23—Pltfs' Interrogatories to Deft. filed (copies to all judges)
4/10/70	24—Affidavit in Opposition to Pltf's Motion for Summary Judgment filed (EDWIN B. PRICE)
4/10/70	25—Affidavit in Opposition to Pltf's Motion for Summary Judgment filed (SANDRA GAY ELLIS)
4/10/70	26—Affidavit in Opposition to Pltf's Motion for Summary Judgment filed (W. O. SHULTZ)
4/10/70	27—Second Amended Answer of Deft, Board of Regents, filed
4/10/70	28—Deft's Answers to Pltfs' Interrogatories filed
4/10/70	29—Deft's Motion to Strike Affidavit of David R. Richards and Depositions thereto filed
4/10/70	30—Deft's Motion to Dismiss filed
4/10/70	31—Opposition to Pltfs' Motion for Summary Judgment filed
4/28/70	32—Pltf's Brief in Support of Motion for Summary Judgment filed
4/28/70	33—Pltf's Notice to Rely on Deft's Answer to Pltf's Interrogatories filed
5/ 1/70	34—Affidavit of Frank C. Erwin, Jr., In Opposition to Motion for Summary Judgment Filed (copies to all 3 Judges)
5/14/70	35—Deft's brief in Opposition to Motion for Summary Judgment and In Support of Motion to Dismiss filed
6/24/70	36—Affidavit in Opposition to Motion for Summary Judgment (Jack Holland) Filed
6/24/70	37—Affidavit in Opposition to Motion for Summary Judgment (Edwin Price) Filed
6/24/70	38—Stipulation filed
6/24/70	39—Plaintiffs' Reply Brief filed
6/26/70	Argument on behalf of Pltfs Response by Deft Court to take case under advisement
9/ 3/70	40—Memorandum Opinion Filed & ent'd copies to attys both sides
9/ 9/70	41—Judgment filed & ent'd copies to judges and attys both sides
9/14/70	42—Opposition to Motion to Stay Enforcement of Judgment filed
10/30/70	43—Notice of Appeal to the Supreme Court of the United States filed copies to all 3 judges and certified copy of Notice and certified copy of docket entrys mailed to Clerk Supreme Court of the U.S.
10/30/70	44—Request to Certify Record and Transmit Record to Supreme Court of the United States filed
11/16/70	45—Transcript of Proceedings and of the Evidence filed
6/26/70	46—Deft's Exhibit list filed
12/14/70	Complete File (certified copies of all but Transcript) sent to Clerk, U.S. Supreme Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL ACTION NO. A-69-CA-106

NEW LEFT EDUCATION PROJECT, CLYDE ALAN LOCKLEAR, NANCY SWEENY, JAMES CALDWELL, PATRICIA CUNEY, DAVID WADDINGTON and LARRY NEIL WINN

v.

BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM

COMPLAINT

I.

Jurisdiction

Jurisdiction of this Court is invoked under the Fourteenth Amendment to the United States Constitution, Title 28, United States Code, Sections 1331 and 1343, 2201 and 2202, and Title 42, United States Code, Sections 1981 and 1983. The matter is controversy exceeds the sum and value of $15,000.00 exclusive of interest and costs.

II.

Nature of Action

A. This is a civil action seeking injunctive relief pursuant to Rule 65, F.R.C.P. Plaintiffs request a permanent injunction, and preliminary injunction if such prove necessary, restraining the defendant from infringing upon the First and Fourteenth Amendment rights of the plaintiffs as set out herein, and specifically restraining the defendants from the further pros-

ecution of cause No. 174,116, styled *Board of Regents of the University of Texas System v. New Left Education Project, Radical Media Project, Paul Spencer and Nancy Sweeny, et al.,* presently pending in the District Court of Travis County, Texas, 167th Judicial District and restraining defendants from otherwise seeking to enforce rules and regulations which impinge upon First Amendment freedoms of the plaintiffs and the class they represent.

B. This action further seeks a declaration under 28 U.S.C., Sections 2201 and 2202 that certain rules and regulations maintained by the defendant as more specifically set out below, are unconstitutional because they unduly restrict First Amendment freedoms of the plaintiffs in that said regulations constitute an unwarranted limitation on free expression.

III.

Parties

A. The individual plaintiffs are residents of Texas and are defendants in cause No. 174,116, styled *Board of Regents of the University of Texas System v. New Left Education Project, Radical Media Project, Paul Spencer and Nancy Sweeny, et al.,* a true copy of which is appended hereto. They are students at the University of Texas in Austin, Texas, and have been associated in the publication and distribution of a newspaper known as "The Rag." Plaintiffs sue on behalf of themselves individually and on behalf of all those similarly situated, to wit those persons who may be now or in the future associated or engaged in the publication and/or distribution of "The Rag," as provided for by Rule 23 in the Federal Rules of Civil Procedure, members of which class are so numerous as to render it impracticable to bring them before the Court.

B. The Defendant Board of Regents of the University of Texas System, hereinafter referred to as "Board," is the plaintiff in the aforedescribed civil action pending in the state court of Travis County and constitutes the governing body of the University of Texas System, including the campus at the University of Texas in Austin, service may be obtained upon defendant by delivering a copy of the Complaint to Frank C. Erwin, Chairman of the Board of Regents. Defendant Board and its members are sued in individual and official capacities.

IV.

Cause of Action

A. "The Rag" is a newspaper published in Austin, Texas on a weekly basis, when funds permit. "The Rag" was founded in 1966 by students at the University of Texas in Austin, Texas and has been continuously published and distributed in Austin since that date. Since its inception "The Rag" has been addressed principally to the community comprised by the students and faculty of the University of Texas at Austin. "The Rag" as of this time continues to be intimately related to the University of Texas at Austin, in that the vast majority of the individuals engaged in its publication and distribution are students at the University of Texas in Austin, as is the bulk of its readership, which exceeds 3000, and the public it seeks to reach is composed principally of the University of Texas community, students and faculty. As any newspaper, in order to survive "The Rag" must levy a charge for its copies, it is not, however, a profit making institution but rather the charge is levied solely that the publication may survive. "The Rag" is part of what has come to be known as the underground press. Its content is

essentially political, and although the content differs somewhat from the conventional daily press, "The Rag" unquestionably constitutes legitimate expression, fully entitled to all the constitutional protections of freedom of speech and press, compare *Stein v. Batchelor*, decided June 9, 1969, (N. D. Tex.).

B. For many months "The Rag" has been sold and distributed on the campus of the University of Texas at Austin, as are other publications, including "The Daily Texan" and the "Austin American-Statesman." Sale of "The Rag" on the campus has in no way interfered with the proper function of the University of Texas. Sale of "The Rag" on the campus has resulted in neither congestion nor litter, nor any other inferences with the legitimate concern of the Board of Regents.

C. The sidewalks and malls of the campus of the University of Texas are "so historically associated with the exercise of First Amendment Rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely." In order for "The Rag" to reach its public, and in order for its public to have reasonable opportunity to obtain "The Rag," salesmen of "The Rag" must have reasonable access to the campus of the University of Texas. Denial of access to the campus of the University of Texas for distribution of "The Rag" would result in a denial of the public rights to full dissemination of expression on public issues.

D. The defendant has filed and presently is maintaining a civil action in the state courts of Texas, a copy of which is attached and incorporated herein, whereby it seeks to enjoin the plaintiffs, and the class they represent, from engaging in activities protected

by the First Amendment. By initiating and maintaining of this pending civil action, the Defendant Board seeks to abridge public rights to full dissemination of public expression and the plaintiffs' rights of freedom of speech, press and expression. Should the state court issue injunctive relief there would result a clear abridgement of constitutionally protected rights of speech, press and expression. By initiating and maintaining this civil action, and by other acts and conduct, the defendant, its agents, representatives and employees and those acting under its control and direction have attempted and are attempting to restrain the plaintiffs in engaging in protected acts of speech, press and expression.

E. The Defendant Board maintains certain rules and regulations which it seeks to enforce by the pending state court action and by threatening disciplinary action against students (these regulations are set out in detail in paragraph VI of Plaintiff's Original Petition in cause No. 174,116 attached hereto). By these regulations and the attempts to enforce them the Defendant Board seeks to limit the exercise of constitutionally protected rights of expression on the premises of the University of Texas at Austin. The existence of the regulations, and the threats to enforce them result in an impermissible chilling effect on First Amendment freedoms.

F. The attempt by the Board to enforce its rules and regulations against the sale of "The Rag" and other political literature identifiable with the dissident student movement constitutes selective enforcement of rules and regulations denying to the plaintiffs equal protection and due process of law, inasmuch as other periodicals continue to be sold and distributed on the campus without interference from the Defendant

Board. Thus even if the regulations in question could constitutionally be imposed upon public property of the University of Texas, the method of enforcement by the Board renders its actions unconstitutional.

G. Finally, the regulations are simply licensing regulations whereby the Board of Regents, its agents and those acting under its direction and control, seek to limit the speech permitted on the campus of the University of Texas to that speech which the defendants find acceptable to them. This attempt to license speech, without objective guidelines within constitutional limitations rendered the regulations in question unconstitutional and void.

H. For the foregoing reasons and for others, the regulations that the Board of Regents seeks to enforce are unconstitutional, and impose unwarranted limitations upon the free exercise of First Amendment rights.

VI.

Injury

On the basis of the foregoing, the plaintiffs allege present and future injury stemming from a violation of their First and Fourteenth Amendment rights. The regulations which the Defendant Board seeks to enforce, by injunctive relief and otherwise impose unreasonable and unwarranted restrictions upon the exercise of First Amendment freedoms. The threatened enforcement of the regulations has a chilling effect on free enpression. Unless the Board is restrained it will continue its prosecution of the state court action and the maintenance and continued prosecution of said action constitutes an unwarranted interference with the paramount institutional interests protected by the First Amendment.

Plaintiffs, the class they represent and the public are threatened with serious and irrevocable injury by reason of the defendant's actions herein complained of. They have no plain, adequate or complete remedy to redress these wrongs other than by this suit for an injunction and the other remedies set forth. Any other remedy, if such were available would be attended by such uncertainties and delays as to deny substantial relief, would involve a multiplicity of suits, cause further irreparable injury and would impose upon the plaintiffs deprivations of their First Amendment freedoms.

WHEREFORE, plaintiffs pray

1. That a temporary injunction be issued if necessary, that a permanent injunction be issued restraining the defendant, and those acting under is direction and control, from further attempts to enforce the rules and regulations restricting the right of distribution on the campus of "The Rag" or other political publications, either by maintenance of state court injunctive action, disciplinary proceedings or threats thereof.

2. A declaration by this Court that the current policy of the University of Texas as embodied in the rules and regulations in question is in violation of the First Amendment.

3. For such other relief as the Court deems just.

CLINTON & RICHARDS
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308 West 11th
Austin, Texas 78701

(Signature)
DAVID R. RICHARDS
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL ACTION NO. A-69-CA-106

(Title omitted in printing)

ANSWER OF THE DEFENDANT, BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM

TO THE HONORABLE JUDGE OF SAID COURT:

Defendant, Board of Regents of the University of Texas System, in reply to Plaintiffs' Complaint, files this its Answer, and would respectfully show the Court as follows:

FIRST DEFENSE

The complaint fails to state a claim against the Defendant upon which relief can be granted.

SECOND DEFENSE

To the extent that the complaint seeks injunctive relief, this Court lacks jurisdiction by virtue of 28 U.S.C. §2283. To the extent that it seeks declaratory relief, it invokes the discretion of the Court under 28 U.S.C. §2201 and this Court, in its discretion, should decline to exercise that jurisdiction and should dismiss the action because all of the issues sought to be raised by Plaintiffs can be fully resolved in the prior civil proceeding against them now pending in the 167th District Court of the State of Texas.

THIRD DEFENSE

I.

A. Defendant denies the allegations contained in Paragraphs I, IVB, IVC, IVF, IVG, IVH and VI of Plaintiffs' Complaint.

B. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph IVA of Plaintiff's Complaint and Paragraph V of Plaintiffs' Complaint if such provisions so exist.

C. Defendant admits the allegations contained in the first sentence of Paragraph IIA of Plaintiffs' Complaint, but the Defendant denies the remaining portion of Paragraph IIA of the Plaintiffs' Complaint.

D. Defendant admits the allegation contained in Paragraph IIB of Plaintiffs' Complaint that this action seeks a declaration under 28 U.S.C., Sections 2201 and 2202 that certain rules and regulations maintained by the Defendant are unconstitutional, but the Defendant denies that portion of Paragraph IIB of the Plaintiffs' Complaint wherein it is alleged that such rules and regulations are unconstitutional because they unduly restrict first amendment freedoms of the Plaintiffs and that said regulations constitute an unwarranted limitation on free expression.

E. Defendant admits the allegations contained in the first two sentences of Paragraph IIIA of Plaintiffs' Complaint, but the Defendant denies the allegations contained in the remaining portion of Paragraph IIIA of Plaintiffs' Complaint.

F. Defendant admits all of the allegations contained in Paragraph IIIB of Plaintiffs' Complaint with the exception that the Defendant denies that service may be obtained upon the individual members of the Board of Regents of the University of Texas System in their individual capacities by service upon Frank C. Erwin, Chairman of the Board of Regents.

G. The Defendant admits the allegations contained in Paragraph IVD of Plaintiffs' Complaint that the

Defendant has filed and presently is maintaining a civil action in the State courts of Texas against the Plaintiffs herein, but the Defendant denies that such suit seeks to enjoin the Plaintiffs and the class they represent from engaging in activities protected by the First Amendment and that the Defendant seeks to abridge public rights to full dissemination of public expression and the Plaintiffs' rights of freedom of speech, press and expression. The Defendant expressly denies all of the allegations made in Paragraph IVD of Plaintiffs' Complaint except those provisions heretofore expressly admitted.

H. Defendant admits the allegations contained in the first sentence of Paragraph IVE of Plaintiffs' Complaint, but the Defendant denies the remaining allegations contained in Paragraph IVE of Plaintiffs' Complaint.

II.

The Board of Regents of the University of Texas System has promulgated the following rules and regulations which are set forth as follows:

> *"Regents' Rules and Regulations, Chapter VI, Part One*
> "6.11 Commercial solicitations will not be authorized on the campus of any component institution of The University of Texas System, unless prior approval has been granted by the institutional head or his representative. Commercial solicitations include the sale, contract of sale, advertisement or promotion for sale, disposition of or contract to dispose of any item of personal property; the inducement of any person, group, or organization to contract with regard to any item of personal property, service, or anything that the offerer may offer; or the solicitation of funds or personal property, except as otherwise provided in this section.
> "6.12 No noncommercial solicitations, including fund-raising for charity, shall be permitted on a campus of a component institution of The University of Texas System without the prior approval of the institutional head or his delegate.
> 6.121 Such approval by the institutional head may be granted for solicitation or fund-raising for the needy or suffering, relief of the poor, or for public benevolent purposes, but it may not be granted for the personal benefit of an individual, group, or registered student organization, to pay for monetary indebtedness incurred by an individual, group, or registered student organization, or to pay any fee, fine, or other charge arising from a violation of federal, state, or local law.

"6.122 Any noncommercial solicitation, including fund-raising for charity, that is approved by the institutional head or his delegate shall be conducted in accordance with reasonable institutional regulations regarding time, place, procedure, and financial reporting and accountability.

"6.123 Notwithstanding the provisions of Section 6.121 above, with the approval of the institutional head or his delegate, a registered student organization may solicit or raise funds from its own members for the benefit of the organization but only at official meetings of the organization."

III.

Plaintiffs have failed to allege in their Complaint that they or the class they represent have attempted to comply with the foregoing rules and regulations of the Defendant.

IV.

Plaintiffs have failed to allege in the instant proceeding why all of the issues raised by the suit in this proceeding cannot be raised as issues in the suit presently pending in the Courts of the State of Texas.

V.

Plaintiffs have failed to show that the present proceeding constitutes anything more than a multiplicity of suits involving the same issues and the same parties to litigation already commenced in the State courts of the State of Texas.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that the relief sought by the Plaintiffs be in all things denied, and that the action be dismissed.

CRAWFORD C. MARTIN
Attorney General of Texas

(Signature)
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Assistant Attorney General

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Assistant Attorney General
Box R, Capitol Station
Austin, Texas 78711

CHARLES ALAN WRIGHT
2500 Red River
Austin, Texas 78705

Attorneys for Defendant

(Certificate of Service omitted in printing)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL ACTION NO. A-69-CA-106

(Title omitted in printing)

SUGGESTION OF NEED FOR A THREE-JUDGE COURT

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiffs in the above-entitled action seek an injunction restraining Defendant, the Board of Regents of the University of Texas System, from enforcing "the rules and regulations restricting the right of distribution on the campus of 'The Rag' or other political publications." The regulation in question is Part One, Chapter Six, Section 6.11 of *Rules and Regulations of the Board of Regents of The University of Texas System for the Government of The University of Texas System.* This is, then, a case in which the Plaintiffs seek an interlocutory or permanent injunction restraining the action of state officers in the enforcement or execution of an order made by an administrative board or commission acting under state statutes. As such, the law requires that it be heard and determined by a district court of three judges, 28 U.S.C. Section 2281, and it is respectfully suggested that this Court should act as required by 28 U.S.C. Section 2284(1) to have such a court convened.

It is entirely clear that a regulation promulgated by the Board of Regents of a state university is within the three-judge court statute. *Clarke v. Redeker,* 259 F.Supp. 117, 120 n. 2 (S.D. Iowa 1966). Even a resolution by a Board of Regents establishing a policy has the same effect. *Sigma Chi Fraternity v. Regents of*

University of Colorado, 258 F.Supp. 515, 521-522 (D.C. Colo. 1966). See also *Soglin v. Kauffman*, 295 F.Supp. 978, 992 (W.D.Wis. 1968), in which the Chief Judge of the Seventh Circuit refused to convene a three-judge court only because he found that the action of the Regents there under challenge was merely a statement of rights, with no proscriptions or sanctions, rather than a prohibitory regulation that might serve as a basis for disciplinary action. That situation is not present in this case.

That the Board of Regents of The University of Texas System is authorized by state statute to make enforcible regulations can hardly be denied. See, e.g., Vernon's Civil Statutes, Art. 2919j(10).

It is undoubtedly true that "the requirement of three judges, of whom one must be a Justice of this Court or a circuit judge, entails a serious drain upon the federal judicial system particularly in regions where, despite modern facilities, distance still plays an important part in the effective administration of justice." *Phillips v. United States*, 312 U.S. 246, 250 (1941). See also *Swift & Co. v. Wickham*, 382 U.S. 111, 128-129 (1965). Unfortunately on the facts of this case there is no escape from the requirement of the statute.

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(Signature)
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Attorneys for Defendant

(Certificate of Service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
TEXAS

CIVIL ACTION NO. A-69-CA-106

(1) Requesting Judge: Honorable
JACK ROBERTS
Western District of Texas

(2) District Judge: Honorable
D. W. SUTTLE
Western District of Texas

(3) Circuit Judge: Honorable
HOMER THORNBERRY

(4) Date of Order: Sept. 9, 1969

NEW LEFT EDUCATION PROJECT, CLYDE ALAN LOCKLEAR, NANCY SWEENY, JAMES CALDWELL, PATRICIA CUNEY, DAVID WADDINGTON AND LARRY NEIL WINN

v.

BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM

The Requesting Judge (1) above named to whom an application for relief has been presented in the above cause having notified me that the action is one required by Act of Congress to be heard and determined by a District Court of three Judges, I, John R. Brown, Chief Judge of the Fifth Circuit, hereby designate the Circuit Judge (3) and District Judge (2) named above to serve with the Requesting Judge (1) as members of, and with him to constitute the said Court to hear and determine the action.

This designation and composition of the three-Judge court is not a prejudgment, express or implied, as to

whether this is properly a case for a three-Judge rather than a one-Judge court. This is a matter best determined by the three-Judge Court as this enables a simultaneous appeal to the Court of Appeals and to the Supreme Court without the delay, awkwardness, and administrative insufficiency of a proceeding by way of mandamus from either the Court of Appeals, the Supreme Court, or both, directed against the Chief Judge of the Circuit, the presiding District Judge, or both. The parties will be afforded the opportunity to brief and argue all such questions before the three-Judge panel either preliminarily or on the trial of the merits, or otherwise, as that Court thinks appropriate. See Jackson v. Choate, 5 Cir., 1968, 404 F.2d 910, Jackson v. Department of Public Welfare of the State of Florida, S.D. Fla., 1968, 296 F.Supp. 1341; City of Gainesville, Georgia v. Southern Railway Company, N.D. Ga., 1969, F.Supp. ; Smith v. Ladner, S.D. Miss., 1966, 260 F.Supp. 918; Hargrave v. McKinney, M.D. Fla., 1969, F.Supp.

(Signature)
JOHN R. BROWN
Chief Judge
Fifth Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

NEW LEFT EDUCATION PROJECT, YOUNG DEMOCRATIC CLUB AT THE UNIVERSITY OF TEXAS AT AUSTIN, CLYDE ALAN LOCKLEAR, NANCY SWEENY, JAMES CALDWELL, PATRICIA CUNEY, DAVID WADDINGTON, LARRY NEIL WINN, EMMA LEIGH WASHBURN, JANIS BUCHANAN, CARL ROBERTS, JAMES R. WEDDINGTON, SETH B. COX, EMILY CALHOUN, RICHARD STREETER, MARILYN TURBOFF, PAULA BEAIRD, ROBERT KLAYMAN, LYSSA KLAYMAN and BARBARA HINES

v.

BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM

CIVIL ACTION NO. A-69-CA-106

MOTION FOR LEAVE TO AMEND

TO THE HONORABLE JUDGES OF SAID COURT:

Come now the Plaintiffs in the above entitled and numbered cause and pursuant to Rule 15, F.R.C.P., move the Court to allow the filing of the attached "First Amended Complaint" and for grounds would show:

1.

New parties plaintiff desire to join in this action to assert the infringement of their own constitutional rights.

2.

Since the filing of the initial complaint herein the rules and regulations of the Board of Regents which

form the subject matter of the cause of action have been substantially amended and this amendment is necessary to bring before the Court the new rules and regulations of the Board of Regents.

3.

To permit the amendment would serve the ends of justice and would not delay the ultimate determination of the cause.

WHEREFORE, premises considered, Plaintiffs respectfully pray that they be permitted to file the attached First Amended Complaint and for such other and further relief as justice may require.

Respectfully submitted,

CLINTON & RICHARDS
205 Texas AFL-CIO Bldg.
308 West 11th
Austin, Texas 78701

(Signature)
DAVID R. RICHARDS

Attorneys for Plaintiffs

(Certificate of Service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL ACTION NO. A-69-CA-106

(Title omitted in printing)

FIRST AMENDED COMPLAINT

I.

Jurisdiction

Jurisdiction of this Court is invoked under the First and Fourteenth Amendments to the United States Constitution, Title 28, United States Code, Sections 1331, 1343, 2201 and 2202, and Title 42, United States Code, Sections 1981 and 1983. The matter in controversy exceeds the sum and value of $15,000.00 exclusive of interests and costs.

II.

Nature of Action

A. This is a civil action seeking injunctive and declaratory relief. Plaintiffs request a permanent injunction, and preliminary injunction if such prove necessary, restraining the defendant from infringing the First and Fourteenth Amendment rights of the plaintiffs and the class they represent, and restraining the defendant from the further prosecution of cause No. 174,116, styled *Board of Regents of the University of Texas System v. New Left Education Project, Radical Media Project, Paul Spencer and Nancy Sweeny, et al.*, presently pending in the District Court of Travis County, Texas, 167th Judicial District and restraining defendant from otherwise seeking to enforce rules and regulations which impinge upon First Amendment freedoms of the plaintiffs and the class they represent.

B. This action further seeks a declaration under 28 U.S.C., Sections 2201 and 2202 that certain rules and regulations maintained by the defendant as more specifically set out below, are unconstitutional because they unduly restrict First Amendment freedoms of the plaintiffs and constitute an unwarranted limitation on free expression.

III.

Parties

A. The plaintiffs Locklear, Sweeny, Caldwell, Cuney, Waddington and Winn are residents of Texas and are defendants in cause No. 174,116, styled *Board of Regents of the University of Texas System v. New Left Education Project, Radical Media Project, Paul Spencer and Nancy Sweeny, et al.*, a true copy of which is appended to Plaintiffs' Original Complaint. They are students at the University of Texas in Austin, Texas, and have been associated in the publication and distribution of a newspaper known as "The Rag." Plaintiffs sue on behalf of themselves individually and on behalf of all those similarly situated, to wit those persons who may be now or in the future associated or engaged in the publication and/or distribution of "The Rag," as provided for by Rule 23 in the Federal Rules of Civil Procedure, members of which class are so numerous as to render it impracticable to bring them before the Court.

B. The Young Democratic Club at the University of Texas at Austin is affiliated with the Young Democratic Club of Texas and in turn an adjunct of the National Democratic Party. The organization has been in existence for many years at the University of Texas and functions in the traditional role of a political or-

ganization, its membership, however, being limited to students enrolled at the University of Texas at Austin. As any political organization the Young Democratic Club at the University of Texas at Austin is an unincorporated association entitled to sue in its own name.

C. The plaintiffs Washburn, Buchanan, Roberts, Weddington, Cox, Calhoun, Streeter, Turboff, Beaird, Klayman and Hines are all individual students at the University of Texas at Austin in undergraduate school and in law school. As such each of them has an interest in the free flow if ideas and the flourishing of public debate at the University of Texas. These plaintiffs sue on their own behalf, and on behalf of a class composed of all students at the University of Texas at Austin who share an interest in the full enjoyment of First Amendment rights for all those in attendance at the University or otherwise associated with the University.

D. The Defendant Board of Regents of the University of Texas System, hereinafter referred to as "Board," is the plaintiff in the aforedescribed civil action pending in the state court of Travis County and constitutes the governing body of the University of Texas System, including the campus at the University of Texas in Austin. Defendant Board and its members are sued in both individual and official capacities.

IV.

Cause of Action

A. "The Rag" is a newspaper published in Austin, Texas on a weekly basis, when funds permit. "The Rag" was founded in 1966 by students at the University of Texas in Austin, Texas and has been continuously published and distributed in Austin since that date. Since its inception "The Rag" has been

addressed principally to the community comprised by the students and faculty of the University of Texas at Austin. "The Rag" as of this time continues to be intimately related to the University of Texas at Austin, in that the vast majority of the individuals engaged in its publication and distribution are students at the University of Texas in Austin, as is the bulk of its readership, which exceeds 3000, and the public it seeks to reach is composed principally of the University of Texas community, students and faculty. As any newspaper, in order to survive "The Rag" must levy a charge for its copies, it is not, however, a profit making institution but rather the charge is levied solely that the publication may survive. "The Rag" is part of what has come to be known as the underground press. Its content is essentially political, and although the content differs somewhat from the conventional daily press, "The Rag" unquestionably constitutes legitimate expression, fully entitled to all the constitutional protections of freedom of speech and press.

B. For many months "The Rag" as well as other publications, has been sold and distributed on the campus of the University of Texas at Austin. Sale of "The Rag" on the campus has in no way interfered with the proper function of the University of Texas. Sale of "The Rag" on the campus has resulted in neither congestion nor litter, nor any other interference with the legitimate concern of the Board of Regents.

C. The Young Democratic Club has uniformly and traditionally imposed membership dues upon those desiring to affiliate with the organization. The dues are minimal, they are however essential to enable the organization to carry out its proper and traditional function. In the past the Young Democratic Club has

been permitted to solicit dues from its members on the campus of the University at the time the member made application for membership, this has proven to be the only effective way of securing their timely dues payment. The solicitation of dues in this fashion has never been an intrusion upon the functions of the University, and the solicitation of dues by the organization is a protected First Amendment right.

D. In addition to the interest of the aforementioned organizations and publications, there is a general interest on the part of all persons associated with the University in the full and free dissemination of ideas. There are numerous publications, both political and other that are entitled to be distributed on the campus of the University in order that the important public right to full dissemination of expression on public issues is permitted to flourish. In addition there are periodic causes, political, social and educational, for which solicitation of funds are required. The restriction and/or prohibition of such solicitations represents an unwarranted intrusion upon First Amendment freedoms of all those associated with the University of Texas at Austin.

E. The sidewalks and malls of the campus of the University of Texas are "so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely."

F. The Defendant Board maintains rules and regulations, the pertinent rules and regulations having been amended since the initial filing of this action, these rules and regulations are appended hereto as Exhibit 1. These regulations, and the attempts to enforce them

by the defendant, limit the exercise of constitutionally protected rights of expression on the premises of the University of Texas at Austin. The very existence of the regulations and the threats to enforce them through disciplinary proceedings and otherwise, constitute an impermissible chilling effect on First Amendment freedoms and is the denial of the important public rights to full dissemination of expression on public issues.

G. More specifically, the Defendant Board of Regents is maintaining a suit in the District Court of the State of Texas, the full text of which is appended the Plaintiffs' Original Complaint, and is hereby incorporated herein, the very maintenance of which abridges the First Amendment rights of the plaintiffs and the class they represent. Additionally Defendant Board, and those acting at its direction and under its control, continues to seek to suppress the distribution of "The Rag" by threats of disciplinary action against those engaged in the distribution on the campus, by taking names of those engaged in the distribution, and by other acts and conduct which are designed to discourage the exercise of First Amendment freedoms.

H. Additionally, disciplinary charges are presently being processed against the Young Democratic Club by the Board of Regents and those acting under its direction and control. The purpose of these disciplinary proceedings is to prohibit the Young Democratic Club from solicitation of dues on the campus of the University of Texas.

I. By the foregoing, and by other acts and conduct, the Defendant Board, and those acting under its direction and control, seeks to enforce the regulations attached hereto and impose the unconstitutional limitations of the regulations upon all the University of

Texas community.

J. The foregoing actions of the Defendant Board represent an intolerable infringement upon the First Amendment freedoms of all those associated with the University of Texas at Austin, unless restrained by this Court, the defendant will continue its unlawful conduct, with the result that important First Amendment freedoms will be unconstitutionally restricted, all to the damage of the plaintiffs and those they represent.

K. The attempt by the Board to enforce its rules and regulations against the sale of "The Rag" and other political literature identifiable with the dissident student movement constitutes selective enforcement of rules and regulations denying to the plaintiffs equal protection and due process of law, inasmuch as other periodicals continue to be sold and distributed on the campus without interference from the Defendant Board. Thus even if the regulations in question could constitutionally be imposed upon public property of the University of Texas, the method of enforcement by the Board renders its actions unconstitutional.

L. Finally, the regulations are simply licensing regulations whereby the Board of Regents, its agents and those acting under its direction and control, seek to limit the speech permitted on the campus of the University of Texas to that speech which the defendant finds acceptable. This attempt to license speech, without objective guidelines within constitutional limitations rendered the regulations in question unconstitutional and void.

M. For the foregoing reasons and for others, the regulations that the Board of Regents seeks to enforce are unconstitutional, and impose unwarranted

limitations upon the free exercise of First Amendment rights.

V.

Injury

On the basis of the foregoing, the plaintiffs allege present and future injury stemming from a violation of their First and Fourteenth Amendment rights. The regulations which the Defendant Board seeks to enforce, by injunctive relief, disciplinary proceedings and otherwise, impose unreasonable and unwarranted restrictions upon the exercise of First Amendment freedoms. Unless the Board is restrained it will continue its prosecution of the state court action and the maintenance and continued prosecution of said action and their efforts to enforce their regulations constitutes an unwarranted interference with the paramount institutional interests protected by the First Amendment.

Plaintiffs, the class they represent and the public are threatened with serious and irrevocable injury by reason of the defendant's actions herein complained of. They have no plain, adequate or complete remedy to redress these wrongs other than by this suit for an injunction and the other remedies set forth. Any other remedy, if such were available would be attended by such uncertainties and delays as to deny substantial relief, would involve a multiplicity of suits, cause further irreparable injury and would impose upon the plaintiffs deprivations of their First Amendment freedoms.

WHEREFORE, plaintiffs pray

1. That a temporary injunction be issued if necessary, and upon final hearing a permanent injunction be issued restraining the defendant, and those acting

under its direction and control, from further attempts to enforce the attached rules and regulations, either by maintenance of state court injunctive action, disciplinary proceedings or in any other improper manner restricting the First Amendment freedoms on the campus of the University of Texas.

2. A declaration by this Court that the current policy of the University of Texas as embodied in the rules and regulations in question is in violation of the First Amendment.

3. For such other relief as the Court deems just.

CLINTON & RICHARDS
205 Texas AFL-CIO Bldg.
308 West 11th
Austin, Texas 78701

(Signature)
DAVID R. RICHARDS
Attorneys for Plaintiffs

(Certificate of Service omitted in printing)

THE UNIVERSITY OF TEXAS AT AUSTIN

Office of the President

Austin, Texas 78712

October 3, 1969
69-009 (Revised)

President

TO: Deans, Chairmen, and Other Administrative Officials
FROM: Norman Hackerman
SUBJECT: Commercial and Noncommercial Solicitations on Campus

The following regulations governing commercial solicitations on campus have been adopted by the Board of Regents. They appear in Chapter VI, Part One, of the Regents' Rules and Regulations.

6.11 Commercial solicitations will not be authorized on the campus of any component institution of The University of Texas System, except as otherwise provided in this section. Commercial solicitations include the sale, contract of sale, advertisement or promotion for sale, disposition of or contract to dispose of any item of personal property; the inducement of any person, group, or organization to contract with regard to any item of personal property, service, or anything that the offerer may offer; or the solicitation of funds or personal property. The following commercial soliciataions are permissible:

(1) commercial solicitations in a Student Union Building that have been approved by the Board of Directors or by the appropriate union governing body subject to applicable instutional rules and regulations and applicable Regents' Rules and Regulations;

(2) the sale of any authorized student publication or any publication authorized by an agency of a component institution;

(3) any commercial solicitation made pursuant to a contract or agreement between the administration of a component institution and the vendor;

(4) the sale of any newspaper or other publication by means of a vending machine located in a campus building, if a certain area or areas within a campus building have been designated in advance by the institutional head or his representative as appropriate for such sales; and

(5) any commercial solicitation necessary for the normal administration, operation, and maintenance of any component institution as an educational institution.

In the implementation of (1) and (4) above the following areas within campus buildings are hereby designated as appropriate for the sale of newspapers and other publications by means of a vending machine.

The vending room of the Texas Union (by virtue of action of the Board of Directors of the Texas Union, approved by the Board of Regents).

The second floor foyer (crossover) between the office and classroom wings of the Business Administration-Economics Building.

The entrance hall to the Law School Snack bar (room 135) in Townes Hall.

The Jester Center Store.

In the implementation of (4) above, the distributor of a newspaper or other publication who wishes to arrange for vending machine sales in an approved area of a campus building shall apply to the administrator

in charge of the approved area. The administrator in turn shall make a decision concerning the application, notifying the applicant and the Office of the President of his decision.

Section 6.12 of Chapter VI, Part One of the Regents' *Rules and Regulations* gives the regulations governing noncommercial solicitations.

6.12 No noncommercial solicitations, including fund-raising for charity, shall be permitted on a campus of a component institution of The University of Texas System without the prior approval of the institutional head or his delegate.

6.121 Such approval by the institutional head may be granted for solicitation or fund-raising for the needy or suffering, relief of the poor, or for public benevolent purposes, but it may not be granted for the personal benefit of an individual, group, or registered student organization, to pay for monetary indebtedness incurred by an individual, group, or registered student organization, or to pay any fee, fine, or other charge arising from a violation of federal, state, or local law.

6.122 Any noncommercial solicitation, including fund-raising for charity, that is approved by the institutional head or his delegate shall be conducted in accordance with reasonable institutional regulations regarding time, place, procedure, and financial reporting and accountability.

6.123 Notwithstanding the provisions of Section 6.121 above, with the approval of the institutional head or his delegate, a registered student organization may solicit or raise funds from its own members for the benefit of the organization but only at official meetings of the organization.

NH:bg

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL ACTION NO. A-69-CA-106

(Title omitted in printing)

DEFENDANT'S OPPOSITION TO MOTION FOR LEAVE TO AMEND

TO THE HONORABLE JUDGES OF SAID COURT:

Defendants in this action have no objection to Plaintiffs' motion for leave to amend insofar as the amended complaint restates the claim put forward in the original complaint. They do object to the motion for leave to amend to the extent that the proposed amendment would lead to a misjoinder of parties.

In the original complaint New Left and those associated with it attacked Part One, Chapter VI, §6.11 of the Regents' Rules and sought to enjoin the Regents from maintaining an action in State court to enforce that provision of the rules. Section 6.11 regulates commercial solicitation at the component institutions of The University of Texas System. That claim is preserved in the amended complaint but now in addition the Young Democratic Club at The University of Texas at Austin seeks to attack Part One, Chapter VI, §6.12 of the Regents' Rules and seeks to enjoin The University of Texas at Austin from maintaining disciplinary proceedings against the Young Democratic Club. Section 6.12 speaks to noncommercial solicitation.

Joinder of parties is properly quite broad under the Federal Rules but the proposed amended complaint goes even beyond those broad bounds. Rule 20(a) provides, in relevant part:

> "All persons may join in one action as plaintiffs if they assent any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action."

The rule thus lays down two tests for joinder. (1) The claims of the Plaintiffs must arise out of a single transaction or occurrence, or series thereof, and (2) there must be a question of law or fact common to all the parties. Both tests must be satisfied for joinder to be proper. *Insull v. New York World-Telegram Corp.*, 172 F.Supp. 615, 637 (N.D. 111, 1959); *Music Merchants, Inc. v. Capitol Records, Inc.*, 20 F.R.D. 462, 465 (E.D.N.Y. 1957); *Philadelphia Dressed Beef Co. v. Wilson & Co.*, 19 F.R.D. 198 (E.D. Pa. 1956); *Neiman-Marcus v. Lait*, 13 F.R.D. 311, 317 (S.D.N.Y. 1952). It was recognized that both tests must be met, but it was held that both were, in *Gilmore v. James*, 274 F.Supp. 75, 89 (N.D. Tex. 1967), affirmed 389 U.S. 572 (1968). It is difficult to see how the claims here put forward can be said to arise from the same transaction. It is impossible to see any question of law or fact common to them. They involve different rules of The University of Texas System, each of which must be measured separately against the requirements of the First and Fourteenth Amendments. One deals with commercial solicitation and the other with non-commercial solicitation. It is familiar learning that different constitutional considerations are involved for the two kinds of solicitation. *Breard v. City of Alexandria*, 341 U.S. 622, 641-642 (1951); *Valentine v. Chrestensen*, 316 U.S. 52, 54-55 (1942). Paragraph IV-K of the proposed amended complaint charges selective enforcement of §6.11 of the rules and thus attacks that section both on its face and as applied. There is no similar challenge by the Young Democrats to the application of §6.12. Finally the attempt by New

Left to stay prosecution of a state court proceeding brings into play 28 U.S.C. §2283 as well as the historic policy of comity between the state and federal courts. Quite different issues are involved in deciding under what circumstances, if any, a federal court can and should interfere with disciplinary proceedings within a state university prior to their conclusion.

For all of the foregoing reasons, we believe that the the proposed amended complaint is improper as a matter of law and that the Court should deny the motion to amend the complaint because of failure to comply with Rule 20(a).

Even if we are wrong about Rule 20(a), the Court should sever the claim of the Young Democrats about §6.12 from the claim of New Left about §6.11. The Court has power to do this under Rules 21 and 42(b). The threshold defenses to the claims of New Left have been fully briefed by both parties and are set for hearing on November 26th. Different defenses are available to the claim of the Young Democrats and these would have to be briefed by the parties. To allow these two distinct claims to be presented in a single law suit would delay and complicate this litigation and be a source of confusion for the Court and the parties.

Respectfully submitted,

CRAWFORD C. MARTIN
Attorney General of Texas

NOLA WHITE
First Assistant

(Signature)
W. O. SHULTZ
Assistant Attorney General

PAT BAILEY
Assistant Attorney General

CHARLES ALAN WRIGHT
2500 Red River
Austin, Texas 78705

Attorneys for Defendant

(Certificate of Service omitted in printing)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL ACTION NO. A-69-CA-106

(Title omitted in printing)

MEMORANDUM IN SUPPORT OF MOTION TO AMEND

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiffs had assumed that the Motion to Amend would be unopposed and hence filed no brief in support of the initial motion. Now that the Attorney General has filed its opposition, we seek to support the Motion. The stated grounds for objection is that it would lead to a misjoinder of parties, yet Professor Wright tells us:

> "Rule 20 deals with permissive joinder of parties. *If a party has some relation to the action,* but it is not so close as to categorize him as necessary or indispensable, *he is a 'proper' party, and the plaintiff has an option whether to join him if the tests of Rule 20 are met.* The rule well exemplifies the modern philosophy of joinder. The provisions for joinder are very broad, but the court is then given discretion to order separate trials or to make such other orders as will prevent delay or prejudice. In this way the scope of a civil action is made a question for the discretion of the judge, to be decided on practical considerations in a particular case, rather than a question governed by conceptual tests, as was true under some of the codes and at common law." Wright, *Handbook of the Law of Federal Courts,* West Publishing Co., 1963, at p. 264. (Emphasis added.)

Thus, "the rule is also intended to promote trial convenience, prevent a multiplicity of suits, and expedite the final determination of litigation by inclusion in one suit of all parties directly interested in the controversy. Despite technical objections previously existing in many situations . . . the rule should therefore be liberally construed and applied in practice when consistent with convenience in the disposition of actions." 2 *Federal Practice and Procedure,* Section 531, p. 178.

It would be particularly burdensome on the federal judiciary to compel the Young Democrats to file a separate action, thus requiring the convening of a second three-judge court in order to test the same regulation of the Board of Regents of the University of Texas. Unless the amendment is allowed and joinder permitted, the Court will be confronted with two potential three-judge court matters involving virtually the same issues.

We gather that the Defendants did not object to the amended pleadings insofar as it brings forward the recently amended rules of the Board of Regents. We are hard-pressed to understand the nature of the Defendant's objection. The heart of the objection would seem to be that we seek to attack both Sections 6.11 and 6.12 of the Regents' Rules in the same proceeding. Yet, the Regents have filed this week an amended pleading in the state court in which they pray for injunction against "defendants and persons acting in concert with defendants . . . from making any other commercial or noncommercial solicitation on the campus of the University of Texas at Austin . . ." (see pleading attached). The tests for joinder under Rule 20 are clearly met in the instant case. All the plaintiffs seek to challenge the constitutionality of the Regents' Rules 6.11 and 6.12.[1] Thus obviously the causes of action asserted by all Plaintiffs raise common questions of law, and undoubtedly of fact also, as to the constitu-

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[1]All Plaintiffs allege in the Amended Complaint (IVb) a general interest in both commercial and noncommercial solicitations and challenge both 6.11 and 6.12 of the Regents' Rules. Indeed when evidence is offered in this cause, Plaintiff Young Democrats will show that they have been restrained from selling bumper stickers on the University of Texas campus because such action would presumably violate the rules against commercial solicitation.

tionality of the Regents' Rules limiting solicitations upon the campus.

The second requirement of Rule 20, i.e. the "same transaction . . or series of transactions," is equally easily satisfied. Again, Professor Wright is clear in his support of a liberal interpretation of the concept of "transaction":

> "One court has suggested that there can be no hard and fast rule and that the approach must be generally whether there are enough factual concurrences that it would be fair to the parties to litigate the matters at one time, having in mind also the convenience of the court. This seems a sensible approach, particularly in so far as it is reminiscent of the 'logical relationship' test which the case law has developed as the meaning of 'transaction or occurrence' in the compulsory counter-claim rule. . . . it seems practically desirable to give the broadest possible reading to the permissive language of Rule 20(a)." Wright, *Handbook of the Law of Federal Courts*, at p. 301.

The "logical relationship" test is found in an early Supreme Court opinion:

> "'Transaction' is a word of flexible meaning. It may comprehend a series of many occurrences depending not so much upon the immediateness of their connection as upon their logical relationship." *Moore v. New York Cotton Exchange*, 270 U.S. 593, 610, 46 S.Ct. 367, 371 (1926).

We recognize, of course, that joinder in this instance is addressed to the Court's discretion. We feel quite strongly that to avoid the multiplicity of litigation implicit in a denial of the Motion to Amend, and the consequent drain upon the federal judiciary, that the amendment should be allowed. The joinder of the new parties will not in any way delay the submission of the cause, and indeed their presence might give a fuller presentation of the issues to the Court.

We respectfully submit that the Motion to Amend should be allowed.

CLINTON & RICHARDS
205 Texas AFL-CIO Bldg.
308 West 11th
Austin, Texas 78701

(Signature)
DAVID R. RICHARDS
Attorneys for Plaintiffs

(Certificate of Service omitted in printing)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL ACTION NO. A-69-CA-106

NEW LEFT EDUCATION PROJECT, CLYDE ALAN LOCKLEAR, NANCY SWEENY, JAMES CALDWELL, PATRICIA CUNEY, DAVID WADDINGTON AND LARRY NEIL WINN, ET AL.

v.

BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM

On November 26, 1969 there was oral argument in the above styled and numbered cause, and this three-judge court, after full consideration of the briefs and argument of counsel, hereby adjudges and declares that:

1. This case is properly one to be heard by a three-judge court convened under 28 U.S.C. § 2281 (1964).

2. The court finds that the claims of all parties plaintiff to plaintiffs' first amended complaint present common questions of law and fact and that they arise out of the same series of occurrences. Accordingly, it is ordered that the plaintiffs' motion to amend, and to join parties plaintiff under rule 20(a), is granted.

3. The court further finds, however, that the claims of the parties plaintiff present different procedural issues. It is therefore ordered that the claims of all parties plaintiff who are parties defendant in Cause No. 174,116, styled *Board of Regents of the University of Texas System v. New Left Education Project, et al.*, presently pending in the 167th Judicial District Court of Travis County, Texas (Part A) are severed from the claims of all other parties to this action (Part B).

4. In Part A, the New Left Education Project and the individual plaintiffs seek to have this Court enjoin the furtherance of proceedings against them in the 167th Judicial District Court of Travis County, Texas, declare Regents' Rules 6.11 and 6.12 unconstitutional, and grant such other relief against the defendant Board of Regents as may be appropriate. The court finds that it should not at this time exercise its jurisdiction as to that part of Part A that requests injunctive relief against the proceedings pending in the 167th Judicial District Court of Travis County, Texas because the extraordinary circumstances required by *Machesky v. Bizzell,* 414 F.2d 283 (5th Cir. 1969), for this type of relief are not presented at this time. Similarly, the court concludes that the prayer of these plaintiffs for declaratory relief, considered separately from the prayer for injunctive relief, should be denied at this time in the exercise of the court's discretion, since this court has no reason to believe that the state court will not adequately resolve the constitutional issues presented to that court. Accordingly, those portions of these plaintiffs' complaint requesting declaratory relief and injunctive relief against the state proceeding are dismissed, so that there will be no interference with the state court's exercise of its jurisdiction. This court, however, retains jurisdiction over that part of the case which requests further appropriate relief against the defendant should such relief become necessary. Moreover, the dismissal of the described portion of these plaintiffs' complaint is done without prejudice to plaintiffs' right to move again in this court for extraordinary relief under *Machesky* should circumstances affecting first amendment rights be changed.

5. In Part B, consisting of all plaintiffs who are

not defendants in proceedings pending in the 167th Judicial District Court of Texas, the Young Democratic Club seeks to challenge the constitutionality of both Regents' Rules 6.11 and 6.12 on their face and as applied to the Young Democratic Club. The court finds that there is confusion as to which of the rules would apply to the Young Democratic Club and that, if all other requisites of jurisdiction appear, the Club may therefore challenge both rules. The individual parties in Part B seek to sue on behalf of all students who wish to assert their right to receive communications in the flow of ideas on campuses of the University of Texas system, and they challenge the constitutionality of both Regents' Rules 6.11 and 6.12 on their face and as applied to the interests of those students. Accordingly, Part B will be considered by this court in further proceedings.

Dated this 17th day of December, 1969.

(Signature)
HOMER THORNBERRY
United States Circuit Judge

(Signature)
D. W. SUTTLE
United States District Judge

(Signature)
JACK ROBERTS
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL ACTION NO. A-69-CA-106

(Title omitted in printing)

MOTION FOR LEAVE TO INTERVENE AS PARTY PLAINTIFF

TO THE HONORABLE JUDGE OF SAID COURT:

1.

The Young Socialist Alliance hereby moves for leave to intervene as a party plaintiff in this action in order to assert their claims under the complaint, and the motions heretofore filed by Plaintiffs.

2.

The Young Socialist Alliance is now, has been at all times material hereto, an unincorporated association composed of individual members, some of whom are students at the University of Texas at Austin. The organization is essentially political in nature and must, as any political organization, depend upon membership contributions and sale of political material for its survival.

3.

As demonstrated by the attached exhibit, charges under the Rules of the University of Texas are pending against the Young Socialist Alliance charging them with selling of literature on the campus of the University of Texas at Austin. In order to prevent imposition of disciplinary sanctions upon the Young Socialist Alliance and in order to insure that the organization may continue to conduct its business on the campus of

the University of Texas at Austin, it is necessary that the Alliance intervene in this proceeding. In this connection your applicant is a member of the class of persons interested in the full enjoyment of First Amendment rights for all those in attendance at the University of Texas as described in paragraph III (C) of Plaintiffs' First Amended Complaint.

4.

Your applicant adopts all material allegations and prayers contained in the First Amended Complaint herein, and adopts that pleading as its own insofar as applicable, and does not intend to file additional pleadings.

5.

The allowance of this application for intervention will neither unduly delay this cause or prejudice the adjudication of rights of the original parties.

WHEREFORE, premises considered, your applicant respectfully prays that it be allowed to intervene in this proceeding as party plaintiff.

Respectfully submitted,

CLINTON & RICHARDS
205 Texas AFL-CIO Bldg.
308 West 11th
Austin, Texas 78701

(Signature)
DAVID R. RICHARDS
Attorneys for Applicant

(Certificate of Service omitted in printing)

THE UNIVERSITY OF TEXAS AT AUSTIN
Office of the Dean of Students
Austin, Texas 78712

December 17, 1969
Assistant Dean of Students

Miss Marianne Hernandez, Chairman
Young Socialist Alliance
4501 Avenue C
Austin, Texas

Dear Miss Hernandez:

In compliance with the Institutional Rules, Sec. 6502, I am notifying you of a hearing to be conducted by a subcommittee of the Committee on Student Organizations on Thursday, January 8, 1970, 3:00 p.m., Union Building 329, concerning an alleged violation by the "Young Socialist Alliance" of *Institutional Rules*, Sec. 10-305(c) and *Regents' Rules*, Part One, Chapter 6, Sec. 6.11 (see attached sheet). A copy of the *Institutional Rules* is enclosed. Provisions referred to appear on page 155.

The alleged violation consists of failure to comply with regulations regarding the selling of literature and the installation of a booth.

Your rights under Sec. 6-502(c)(2) entitle you:

(A) to a private hearing (on request at time of hearing);
(B) to know the identity of each witness who will testify against you (Dean Price is the only witness);
(C) to appear at the hearing through a representative or adviser or both;
(D) to summon witnesses, require the production of documentary and other evidence, and offer evidence and argue on your behalf;
(E) to cross examine each witness who testifies against you;
(F) to have the hearing recorded verbatim and have a stenographic digest made of the recording;
(G) to make your own transcript of the hearing;
(H) to appeal under Subchapter 6-600 (page 143).

Additional people may attend the hearing with your consent as expressed in Sec. 6-503(b) (page 143).
The subcommittee consists of Dr. F. X. Bostick, Dr. Margaret Gibbs, and myself as chairman.

If you feel the information is inadequate in some respect or needs further clarification, do not hesitate to call me at 477-1476 (preferably late in the evening).

Sincerely,
KEN SPARKS
Subcommittee Chairman
Committee on Student Organizations

KS:fr
cc: Dr. Janet T. Spence
Dr. Charles E. Cairns
Dr. F. X. Bostick
Dr. Margaret Gibbs
Enclosure (2) *Institutional Rules, Regents' Rules*, Part One, Chapter 6, Sec. 6.11

REGENTS' RULES, PART ONE, CHAPTER 6, SEC. 6.11

Commercial solicitations will not be authorized on the campus of any component institution of The University of Texas System, except as

otherwise provided in this section. Commercial solicitations include the sale, contract of sale, advertisement or promotion for sale, disposition of or contract to dispose of any item of personal property; the inducement of any person, group, or organization to contract with regard to any item of personal property, service, or anything that the offerer may offer; or the solicitation of funds or personal property. The following commercial solicitations are permissible:

(1) commercial solicitations in a Student Union Building that have been approved by the Board of Directors or by the appropriate union governing body subject to applicable institutional rules and regulations and applicable Regents' Rules and Regulations;
(2) the sale of any authorized student publication or any publication authorized by an agency of a component institution;
(3) any commercial solicitation made pursuant to a contract or agreement between the administration of a component institution and the vendor;
(4) the sale of any newspaper or other publication by means of a vending machine located in a campus building, if a certain area or areas within a campus building have been designated in advance by the institutional head or his representative as appropriate for such sales; and
(5) any commercial solicitation necessary for the normal administration, operation, and maintenance of any component institution as an educational institution.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL ACTION No. A-69-CA-106

(Title omitted in printing)

NEW LEFT EDUCATION PROJECT, ET AL.

v.

BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM

ORDER GRANTING LEAVE TO INTERVENE

Came on this day for consideration by the Court, a Motion for Leave to Intervene as a Party Plaintiff in this cause, filed by the Young Socialist Alliance; and the Court being of the Opinion that the Motion is meritorious; it is accordingly

Adjudged, Ordered and Decreed that the Young Socialist Alliance be, and is hereby, allowed to intervene as a party plaintiff in this cause.

Signed at Austin, Texas, this 10th day of February, 1970.

(Signature)
HOMER THORNBERRY
United States Circuit Judge

(Signature)
DORWIN W. SUTTLE
United States District Judge

(Signature)
JACK ROBERTS
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL ACTION NO. A-69-CA-106
(Title omitted in printing)

FIRST AMENDED ANSWER OF THE DEFENDANT, BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM

TO THE HONORABLE JUDGE OF SAID COURT:

Defendant, Board of Regents of the University of Texas System, in reply to Plaintiffs, First Amended Complaint, files this its First Amended Answer, and would respectfully show the Court as follows:

FIRST DEFENSE

The complaint fails to state a claim against the Defendant upon which relief can be granted.

SECOND DEFENSE

To the extent that the complaint seeks injunctive relief, this Court lacks jurisdiction by virtue of 28 U.S.C. §2283. To the extent that it seeks declaratory relief, it invokes the discretion of the Court under 28 U.S.C. §2201 and this Court, in its discretion, should decline to exercise that jurisdiction and should dismiss the action because all of the issues sought to be raised by Plaintiffs can be fully resolved in the prior civil proceedings against them now pending in the 167th District Court of the State of Texas.

THIRD DEFENSE

I.

A. Defendant denies the allegations contained in

Paragraphs I, IVB, IVE, IVJ, IVK, IVL, IVM, and V of Plaintiffs' First Amended Complaint.

B. Defendant admits the allegations of the first sentence of Paragraph IIA of Plaintiffs' First Amended Complaint, but denies the remainder of said Paragraph.

C. Defendant admits the allegation contained in Paragraph IIB of Plaintiffs' Complaint that this action seeks a declaration under 28 U.S.C., Sections 2201 and 2202 that certain rules and regulations maintained by the Defendant are unconstitutional, but the Defendant denies that portion of Paragraph IIB of the Plaintiffs' Complaint wherein it is alleged that such rules and regulations are unconstitutional because they unduly restrict first amendment freedoms of the Plaintiffs and that said regulations constitute an unwarranted limitation on free expression.

D. Defendant admits the allegations of the first two sentences of Paragraph IIIA of Plaintiffs' First Amended Complaint, except that Defendant denies that a true copy of Defendant's current pleadings in Cause No. 174,116 in the 167th District Court of Travis County, Texas, are attached to Plaintiffs' Original Complaint, and Defendant further denies the remainder of the allegations of said Paragraph.

E. Defendant is without knowledge sufficient to form a belief as to the truth of the allegations of Paragraph IIIB of Plaintiffs' First Amended Complaint.

F. Defendant admits the first sentence of Paragraph IIIC of Plaintiffs' First Amended Complaint, but is without knowledge sufficient to form a belief as to the truth of the remainder of the allegations of said Paragraph.

G. Defendant admits the allegations of Paragraph IIID of Plaintiffs' First Amended Complaint, with the exception that Defendant denies that the members of the Board of Regents of the University of Texas System have been served with process in this cause in their individual capacities.

H. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph IVA of Plaintiffs' First Amended Complaint.

I. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first two sentences of Paragraph IVC of Plaintiffs' First Amended Complaint. With regard to the remainder of the allegations of said Paragraph, Defendant admits that the Young Democratic Club has been permitted to solicit dues from its members upon the campus at the University of Texas at Austin but denies that such solicitation of dues has been permitted at any place or time other than at registration periods; Defendant further denies the allegations of the last sentence of said Paragraph.

J. Defendant denies the allegations of the last sentence of Paragraph IVD of Plaintiffs' First Amended Complaint and is without knowledge or information sufficient to form a belief as to the truth of the remainder of the allegations of said Paragraph.

K. Defendant admits the allegations of the first sentence of Paragraph IVF of Plaintiffs' First Amended Complaint and denies the remainder of the allegations of said Paragraph.

L. Defendant admits the allegation of Paragraph IVG of Plaintiffs' First Amended Complaint that De-

fendant is maintaining a suit in 167th District Court of Travis County, Texas, but denies that the full text of such actions is appended to Plaintiffs' Original Complaint; Defendant denies all other allegations of said Paragraph, except that Defendant admits that it is and has been enforcing Regents Rule 6.11 against those who engage in commercial solicitation of "The Rag" on the campus of the University of Texas at Austin.

M. Defendant admits the allegations of Paragraph IVH of Plaintiffs' First Amended Complaint.

N. Defendant admits the allegations of Paragraph IVI of Plaintiffs' First Amended Complaint with regard to the enforcement of its rules and regulations but deny that said rules and regulations or their enforcement are unconstitutional limitations upon anyone's rights.

II.

The Board of Regents of the University of Texas System has promulgated the following rules and regulations relating to solicitations upon the campuses of the component institutions of the System including the University of Texas at Austin:

Regents' Rules and Regulations, Chapter VI, Part One

6.11 Commercial solicitations will not be authorized on the campus of any component institution of The University of Texas System, except as otherwise provided in this section. Commercial solicitations include the sale, contract of sale, advertisement or promotion for sale, disposition of or contract to dispose of any item of personal property; the inducement of any person, group, or organization to contract with regard to any item of personal property, service, or anything that the offerer may offer; or the solicitation of funds or personal property. The following commercial solicitations are permissible:

(1) commercial solicitations in a Student Union Building that have been approved by the Board of Directors or by the appropriate union governing body subject to applicable institutional rules and regulations and applicable Regents' Rules and Regulations;

(2) the sale of any authorized student publication or any publication authorized by an agency of a component institution;

(3) any commercial solicitation made pursuant to a contract or agreement between the administration of a component institution and the vendor;

(4) the sale of any newspaper or other publication by means of a vending machine located in a campus building, if a certain area or areas within a campus building have been designated in advance by the institutional head or his representative as appropriate for such sales; and

(5) any commercial solicitation necessary for the normal administration, operation, and maintenance of any component institution as an educational institution.

6.12 No noncommercial solicitations, including fund raising for charity, shall be permitted on a campus of a component institution of The University of Texas System without the prior approval of the institutional head or his delegate.

6.121 Such approval by the institutional head may be granted for solicitation or fund raising for the needy or suffering, relief of the poor, or for public benevolent purposes, but it may not be granted for the personal benefit of an individual, group, or registered student organization, to pay for monetary indebtedness incurred by an individual, group, or registered student organization, to pay any fee, fine, or other charge arising from a violation of federal, state, or local law.

6.122 Any noncommercial solicitation, including fund raising for charity, that is approved by the institutional head or his delegate shall be conducted in accordance with reasonable institutional regulations regarding time, place, procedure and financial reporting and accountability.

6.123 Notwithstanding the provisions of Section 6.121 above, with the approval of the institutional head or his delegate, a registered student organization may solicit or raise funds from its own members for the benefit of the organization but only at official meetings of the organization.

III.

Plaintiffs have failed to allege in their complaint that they or the class they represent have attempted to comply with the foregoing rules and regulations of the Defendant.

IV.

Plaintiffs have failed to allege why all of the issues raised by the suit in this proceeding cannot be raised as issues in the action brought by Defendant in the 167th District Court of Travis County, Texas.

V.

Plaintiffs have failed to allege or show that this action constitutes anything more than a multiplicity of suits involving the same issues already involved in the 167th District Court of Travis County, Texas.

VI.

Defendant alleges that the Plaintiff, Young Socialist Alliance, obtained permission from the Board of Directors of the Student Union of the University of Texas at Austin to sell and distribute certain literature within the Student Union but that such Plaintiff exceeded such permission and sold and distributed said literature upon the West Mall of the campus of the University of Texas at Austin in violation of Regents Rule 6.11.

VII.

Defendant alleges that Regents Rule 6.124 now in effect throughout the University of Texas System permits registered organizations to solicit membership and dues during periods of registration at the places set aside for registration of students for the University of Texas System. The Plaintiff, the Young Democratic Club, was permitted to solicit, and did solicit, membership and dues at the registration of students for the Spring Semester of 1970 upon the campus of the University of Texas at Austin.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that the relief sought by Plaintiffs be in all things denied, and that this action be dismissed.

CRAWFORD C. MARTIN
Attorney General of Texas

(Signature)
W. O. SHULTZ
Assistant Attorney General

PAT BAILEY
Assistant Attorney General
Box R, Capitol Station
Austin, Texas 78711

CHARLES ALAN WRIGHT
2500 Red River
Austin, Texas 78705

Attorneys for Defendant

(Certificate of Service omitted in printing)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL ACTION NO. A-69-CA-106

(Title omitted in printing)

MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGES OF SAID COURT:

Come now the Plaintiffs in part B of this action together with the Young Socialist Alliance, and move the Court to grant summary judgment pursuant to the provisions of Rule 56; declaring the Regents' Rules 6.11 and 6.12 to be violative of the First Amendment of the Constitution of the United States and unenforceable, and enjoining enforcement of the same, and for grounds would respectfully show:

1.

That there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

2.

Plaintiffs attach hereto and make a part hereof the affidavit of Gene Dolfi, President of the University of Texas Young Democratic Club, which affidavit is accompanied by certain attachments, all of which are relied upon by Plaintiffs in support of summary judgment.

3.

Plaintiffs further attach and makes part hereof the affidavit of Tom Kincaid of the Young Socialist Alliance, together with certain attachments, all of which

are relied upon in support of this motion for summary judgment.

4.

Plaintiffs further attach and incorporate herein the affidavit of their attorney, together with certain attachments, to wit the oral depositions given by representatives of the Defendant, which depositions have been signed and filed and are presently of record in the office of the District Clerk of Travis County, Texas.

WHEREFORE, premises considered, your Plaintiffs respectfully pray that this Court grant summary judgment pursuant to Rule 56 for the relief prayed.

Respectfully submitted,

CLINTON & RICHARDS
205 Texas AFL-CIO Bldg.
308 West 11th
Austin, Texas 78701

(Signature)
DAVID R. RICHARDS
Attorneys for Plaintiffs

(Certificate of Service omitted in printing)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL ACTION NO. A-69-CA-106

(Title omitted in printing)

AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

THE STATE OF TEXAS)
COUNTY OF TRAVIS)

Gene Dolfii, being first duly sworn, deposed and said:

My name is Gene Dolfi. I am the president of the University of Texas Young Democrats, a political organization chartered by the Young Democratic Clubs of America and having its membership made up of students of the University of Texas at Austin. This organization has functioned on the University of Texas campus for many years and is engaged presently in the kind of activities typically associated with any political organization, the sponsoring of political speakers, the dissemination of political ideas, and the solicitation of members to join the organization and to work in political endeavors.

With the beginning of the fall semester of 1969 the University of Texas Regents applied a new regulation (Section 6.11 and 6.12) to our organization and to other organizations prohibiting the solicitation of membership dues during registration. This has been a traditional form of membership solicitation by various campus organizations. Since that time, and since the filing of this suit, the Regents' Rules have been modified to permit the solicitation of dues on the campus during registration as reflected by the attached Exhibit A and accordingly our organization did solicit

membership dues during registration for the spring semester of 1970. This relaxation of the Regents' Rules does not, however, permit our organization to solicit dues during the balance of the year nor to sell political literature on the campus in the areas traditionally associated with the dissemination of speech.

Thus we continue to be prohibited from maintaining a booth on the west mall or on the main mall of the campus for the purpose of soliciting dues or selling of literature. Although we can erect a booth and can distribute literature so long as we do not levy a charge for it, this limitation imposes substantial economic hardship upon our organization and limits our capacity to discharge our function as a political organization.

It continues to be commonplace for various organizations with University approval to sell on these areas of the campus items for fund raising purposes and of course, University sanctioned publications such as the Ranger continue to be sold at various campus locations to which we are denied access for the purpose of soliciting membership dues or selling publications we would choose to sponsor.

I have read the foregoing affidavit, I have personal knowledge of the material contained therein, and it is true and correct.

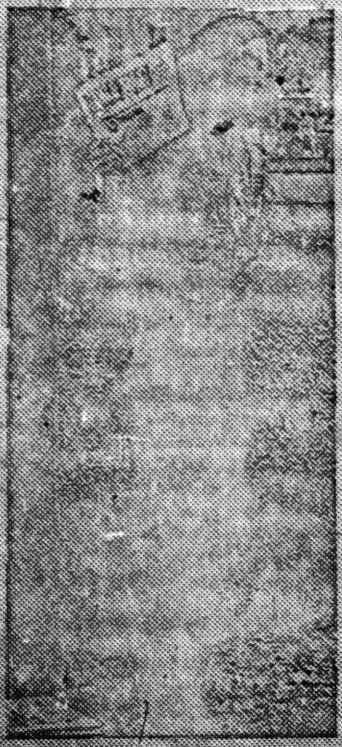
(Signature)
GENE DOLFI

(Jurat omitted in printing)

THE DAILY TEXAN

Student Newspaper at The University of Texas at Austin

AUSTIN, TEXAS, WEDNESDAY, JANUARY 28, 1970 Twelve P.



—Photo by Steve Holmes.

Rag Seller

. . . soliciting on campus.

Solicitation Starts Under New Ruling

By RUTH DOYLE
Assistant Managing Editor

Representatives of student organizations were elbow-to-elbow with Rag salesmen as both groups started solicitation drives Tuesday.

A regents' ruling Saturday made legal student organization membership drives at Gregory Gym during registration week. As a result, groups such as the Young Democrats and the Young Republicans were collecting dues legally at registration Tuesday.

However, Rag salesmen on campus were selling in violation of the regents' ruling, according to Dr. Stephen McClellan, dean of students.

And, McClellan emphasized, the Rag salesmen were not the only people soliciting funds illegally.

McClellan explained that the treatment given to all those who solicit in violation of the regents' reasonable standard.

"We approach the people and inform them that they are in violation of the regents' rule. We ask them to stop.

"Some do," McClellan said, noting that several approached Tuesday had stopped their illegal solicitation.

"If they do not stop, then we ask for their identification and process them as part of litigation now pending in a court case."

Richard Gibson, an attorney for the University System, explained that the suit, the Board of Regents vs. the New Left Educational Project, et al, is being handled through the attorney general's office.

He said that the suit, scheduled to come up for trial at 9 a.m. Feb. 25 in U.S. District Court, was an attempt to restrain people from illegally soliciting on campus. Solicitors' names are added to this list.

McClellan said, however, that if a student refuses to present his identification, "We don't hassle with him. We walk away.

"The only alternative would be to have him removed, and I don't believe this is the way to handle the situation," he said.

Malcolm McNeil, a member of the Young Democrats, said that his group is collecting dues at registration.

At present the University Young Democrats are involved in a suit against the Board of Regents, charging that their solicitable prohibition ruling is unconstitutional.

The suit, according to McNeil, will be pressed.

Gene Daiß, president of the Young Democrats, said that the ruling of the prohibition on asking for money did not change the damage done to the club as a political organization.

He said that the fact that the regents had given the organization the right to collect dues two weeks out of the year does not help the club the rest of the time.

EXHIBIT A

BEST AVAILABLE COPY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL ACTION NO. A-69-CA-106

(Title omitted in printing)

AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

THE STATE OF TEXAS)
COUNTY OF TRAVIS)

Tom Kincaid, being first duly sworn, deposed and said:

I am Tom Kincaid and have personal knowledge of the facts herein set forth.

This affidavit is submitted in support of Plaintiff's Motion for Summary Judgment herein, for the purpose of showing that there is in this action no genuine issue as to any material fact, and that the Plaintiff is entitled to judgment as a matter of law.

I am a member of the Young Socialist Alliance, and a member of the Executive Board of the organization. This organization is composed of students and staff members of the University of Texas at Austin. It has been in existence since 1960, it is an independent socialist organization, having as one of its principal goals the dissemination of political ideas.

One of the traditional methods used by the organization to disseminate political ideas, theory and argument is through the sale of pamphlets, books and periodicals. Thus the organization typically sells "The Militant," the weekly paper published by the Socialist Workers Party, and books such as *Revolution Betrayed* by Leon Trotsky. These constitute but a sample

of the written material normally sold by the organization, all of which material is of a political nature. This material is sold not for the purpose of making a profit for the organization but solely to disseminate political speech.

Under the present rules and regulations of the Board of Regents of the University of Texas (to-wit 6.11 and 6.12) the Young Socialist Alliance is prohibited from selling its literature or soliciting membership dues in those areas of the campus where speech is traditionally exercised, to-wit the west mall of the campus and the main mall of the main campus. These areas of the campus are traditionally associated with the exercise of free speech and many organizations regularly establish booths and distribute literature, both political and otherwise, in these areas. Indeed our organization will be permitted to set up a table in this area for the free distribution of literature but we are prohibited from selling literature or soliciting dues in any area of the campus with the exception of an area set aside in the Student Union Building. The area in the Student Union Building does not permit full access to the student body.

Under the rules and regulations of the Board of Regents as they are currently being interpreted and applied, our organization would be permitted to establish a booth on the west mall or the main mall or perhaps other areas of the campus and give away literature but we are prohibited from selling literature or soliciting dues in these areas. Indeed organizations such as the Crusade for Christ regularly distributes all across the campus, without interference from the University, its newspaper. This distribution is apparently authorized by the rules and regulations of the Board of Regents because they make no charge for their newspaper.

During December, 1969, our organization put up a table on the west mall for the purpose of distributing literature, this resulted in charges being filed against our organization for violation of Article 6.11 of the Regents' Rules as demonstrated by Exhibit A attached and incorporated in this affidavit. The literature being sold on the occasion in question was purely political literature of the type described previously in this affidavit.

During the same time that our organization maintained the table on the west mall selling literature there was established nearby a table by members of the University of Texas Choir where they were selling cookies to the passers-by for the ostensible purpose of defraying expenses for travel by the choir to Europe. Sales such as this kind are typical and are carried out by the organizations without interference from the University. So far as I am aware, although our organization was charged with violation of the Rules and Regulations for selling literature, no charges were filed against the University of Texas Choir for the selling of cookies in the same locale.

Attached hereto as Exhibit B is a further example of the kind of sales that are typically permitted on the University of Texas campus, the attached having appeared in the February 5, 1970 issue of the Daily Texan and I personally observed the sale of the balloons on the campus, the sale having taken place without apparent interference from any University of Texas official.

Sales such as reflected in Exhibit B attached and by the U.T. Choir as described, are regularly carried out at various locations on the U.T. campus, typically on the west mall or main mall. These same areas are the site of regular distribution of literature by various

campus organizations, the holding of political rallies, and in addition it is quite common for signs of various kinds advertising meetings, social and entertainment events, to be posted in this area and to remain there without interference from University of Texas officials.

I am on the University of Texas campus regularly, during my visits to the campus I am frequently in various campus buildings and have observed that there continue to be posted on bulletin boards in various buildings advertisements for sale of various personal items such as cars or furniture and advertisements for performance of various services such as typing, baby sitting, etc. These commercial solicitations are prominently posted and have been continuously posted during the past six months without any apparent interference from the University of Texas officials.

The limitations imposed upon this organization by the Regents' Rules restricting the right to sell political literature and to solicit membership dues represents a substantial limitation upon the organization's capacity to disseminate its political speech and maintain the organization through membership dues.

I have read the foregoing affidavit, I have personal knowledge of the material contained therein, and it is true and correct.

(Signature)

TOM KINCAID

(Jurat omitted in printing)

THE UNIVERSITY OF TEXAS AT AUSTIN
Office of the Dean of Students
Austin, Texas 78712

December 17, 1969

Assistant Dean of Students

Miss Marianne Hernandez, Chairman
Young Socialist Alliance
4501 Avenue C
Austin, Texas

Dear Miss Hernandez:

In compliance with the Institutional Rules, Sec. 6502, I am notifying you of a hearing to be conducted by a subcommittee of the Committee on Student Organizations on Thursday, January 8, 1970, 3:00 p.m., Union Building 329, concerning an alleged violation by the "Young Socialist Alliance" of *Institutional Rules*, Sec. 10-305(c) and *Regents' Rules*, Part One, Chapter 6, Sec. 6.11 (see attached sheet). A copy of the *Institutional Rules* is enclosed. Provisions referred to appear on page 155.

The alleged violation consists of failure to comply with regulations regarding the selling of literature and the installation of a booth.

Your rights under Sec. 6-502(c)(2) entitle you:

(A) to a private hearing (on request at time of hearing);
(B) to know the identity of each witness who will testify against you (Dean Price is the only witness);
(C) to appear at the hearing through a representative or adviser or both;
(D) to summon witnesses, require the production of documentary and other evidence, and offer evidence and argue on your behalf;
(E) to cross examine each witness who testifies against you;
(F) to have the hearing recorded verbatim and have a stenographic digest made of the recording;
(G) to make your own transcript of the hearing;
(H) to appeal under Subchapter 6-600 (page 143).

Additional people may attend the hearing with your consent as expressed in Sec. 6-503(b) (page 143).

The subcommittee consists of Dr. F. X. Bostick, Dr. Margaret Gibbs, and myself as chairman.

If you feel the information given is inadequate in some respect or needs further clarification, do not hesitate to call me at 477-1476 (preferably late in the evening).

Sincerely,

KEN SPARKS
Subcommittee Chairman
Committee on Student Organizations

KS:fr
cc: Dr. Janet T. Spence
Dr. Charles E. Cairns
Dr. F. X. Bostick
Dr. Margaret Gibbs

Enclosures (2) *Institutional Rules, Regents' Rules*, Part One, Chapter 6, Sec. 6.11

REGENTS' RULES, PART ONE, CHAPTER 6, SEC. 6.11

Commercial solicitations will not be authorized on the campus of any component institution of The University of Texas System, except at

otherwise provided in this section. Commercial solicitations include the sale, contract of sale, advertisement or promotion for sale, disposition of or contract to dispose of any item of personal property; the inducement of any person, group, or organization to contract with regard to any item of personal property, service, or anything that the offerer may offer; or the solicitation of funds or personal property. The following commercial solicitations are permissible:

(1) commercial solicitations in a Student Union Building that have been approved by the Board of Directors or by the appropriate union governing body subject to applicable institutional rules and regulations and applicable Regents' Rules and Regulations;
(2) the sale of any authorized student publication or any publication authorized by an agency of a component institution;
(3) any commercial solicitation made pursuant to a contract or agreement between the administration of a component institution and the vendor;
(4) the sale of any newspaper or other publication by means of a vending machine located in a campus building, if a certain area or areas within a campus building have been designated in advance by the institutional head or his representative as appropriate for such sales; and
(5) any commercial solicitation necessary for the normal administration, operation, and maintenance of any component institution as an educational institution.

Weather:
Partly Cloudy
High: Upper 60's
Low: Near 50

THE DAIL

Student Newspaper at The Univ

Vol. 69 Price Ten Cents AUSTIN, TEXAS, THURSDAY,

Nixon Gives New Orders On Pollution

Federal Agencies Get 3 Years, $359 Million For Clearing Air, Water

WASHINGTON (AP) — President Richard M. Nixon said Wednesday he is giving federal agencies three years and $9 million to stop polluting the air and water.

It already has been federal policy to conform with existing air and water quality standards, but Nixon said previous orders are "ambiguously worded, poorly enforced and generally ineffective."

Nixon issued an executive order requiring all federal facilities — including "buildings, installations, structures, public works, equipment, aircraft, vessels and other vehicles and property" — to complete or at least begin necessary pollution abatement actions by Dec. 31, 1972, at the latest.

Agency heads were ordered to send their plans for meeting that deadline to the Budget Bureau by next June 30.

Funds appropriated to clean up federal pollution may not be used for any other purpose, Nixon ordered.

Undersecretary of the Interior Russell E. Train, chairman-designate of the President's Environmental Quality Council, told newsmen the federal budget proposed Monday for fiscal 1971 includes $32 million as the first segment of Nixon's $359 million program against federal pollution — $10 million from "reprogramming" of Defense Department money and $22 million spread among the budgets of other agencies.

Train said the funds appropriated for federal pollution abatement in fiscal 1971, 1972 and 1973 together totaled $9 million, and not all of that reached final.

Nixon said in a statement, "Over the next several years, the federal government

—Photo by Dick Williams

"Vautineers" were on the West Mall Wednesday selling balloons to promote their work in East Austin as block workers, tutors and day care for the Community Involvement Committee. (Related story, Page 9.)

Balloons, Sun, Happy Volunteer

House Passes Res

EXHIBIT B

BEST AVAILABLE COPY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL ACTION NO. A-69-CA-106

(Title omitted in printing)

AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

THE STATE OF TEXAS)
COUNTY OF TRAVIS)

My name is David R. Richards, I am an attorney licensed to practice before the courts of the State of Texas and this Honorable Court, I make this affidavit in support of Motion for Summary Judgment in this cause. This affidavit is based upon personal knowledge of the matters set out herein.

As attorney for the Defendants in Cause No. 174,116, styled *THE BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM V. NEW LEFT EDUCATION PROJECT, ET AL.,* in the District Court of Travis County, Texas, 167th Judicial District, and as attorney of record for the Plaintiffs in this cause, the oral depositions were taken by agreement of Frank C. Erwin, Jr., Chairman of the Board of Regents of the University of Texas and Edwin Booth Price, Assistant Dean of Students at the University of Texas at Austin. These depositions were taken on November 7, 1969, and I was present throughout the taking of the depositions and participated in the examination of the witnesses during the course of the depositions.

These depositions, copies of which are attached hereto, were thereafter signed by the witnesses and filed with the District Clerk of Travis County, Texas, and

are a part of the official proceedings in cause No. 174,116, *THE BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM V. NEW LEFT EDUCATION PROJECT, ET AL.* In this connection the hearing on temporary injunction in the aforementioned State Court proceeding, the deposition of Frank C. Erwin, Jr. was offered in substantial part by the attorneys for the Board of Regents of the University of Texas System.

The attached depositions are true and correct copies of the original depositions on file in the State Court proceeding as indicated, and accurately reflect the testimony given by the witnesses during the course of deposition.

I have read the foregoing affidavit, I am personally familiar with the contents thereof and the factual matters upon which it is based and it is true and correct.

(Signature)
DAVID R. RICHARDS

(Jurat omitted in printing)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL ACTION NO. A-69-CA-106

(Title omitted in printing)

INTERROGATORIES

TO THE BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM, DEFENDANT:

You are hereby notified to answer under oath the following interrogatories, within fifteen (15) days of the time of service upon you, in accordance with Rule 33 of the Federal Rules of Civil Procedure.

Interrogatory No. 1

Beginning September 1, 1969, to date, state the name of and describe each student publication which has been authorized to be sold on the campus of the University of Texas at Austin pursuant to the provisions of Regents' Rule 6.11(2).

Interrogatory No. 2

Beginning September 1, 1969, to date, state the name of and describe every other publication which has been authorized for sale on the University of Texas campus at Austin by an agency of a component institution pursuant to Regents' Rule 6.11(2).

Interrogatory No. 3

Beginning September 1, 1969, to date, describe every commercial solicitation which has been authorized to be made on the University of Texas campus at Austin pursuant to the Regents' Rule 6.11(3).

Interrogatory No. 4

State the precise location of every area which has been designated pursuant to Regents' Rule 6.11(4) for the sale of newspapers or other publications by means of a vending machine.

Interrogatory No. 5

Describe every other commercial solicitation which has been authorized to be made on the University of Texas campus at Austin pursuant to any other provision of Regents' Rule 6.11.

Interrogatory No. 6

Since January 1, 1970, describe in detail, including the name of the organization or individual involved, the purpose of the solicitation, the time and place such solicitation was to be conducted, every "noncommercial solicitation" which has been authorized to be made on the University of Texas campus at Austin pursuant to the provisions of Regents' Rule 6.12.

Interrogatory No. 7

Since January 1, 1970, to date, state the name of each organization, or individual, that has applied for and received permission to establish a booth or table, on the premises of the campus of the University of Texas at Austin, whether within a building or on the malls or sidewalks. State the purpose for which said booth or table was to be established, and the place where it was to be established as well as the dates and duration for which it was authorized.

Interrogatory No. 8

Since January 1, 1970, to date, describe in detail every publication, circular, handbill, petition or other piece of literature which has been filed for the purpose

of securing authority to publicly distribute said literature on the University of Texas campus at Austin pursuant to the provisions of Section 10-301 of the Institutional Rules of the University of Texas at Austin. In addition to describing the literature state the name of the student or the organization distributing the literature.

Interrogatory No. 9

Since January 1, 1970, to date, describe in detail every "sign" for which authority for posting has been obtained by a filing pursuant to Section 10-302 of the Institutional Rules of the University of Texas at Austin. Describe the sign, give the name of the student or organization which sponsored the sign and the proposed location for posting as well as the length of time the signs were to be posted.

Interrogatory No. 10

Is the attached exhibit an accurate copy of Subchapter 10-300 of the Institutional Rules of the University of Texas at Austin? Are these Rules presently in effect with respect to the University of Texas at Austin? If not, please state precisely what portions of the attached Rules are not in effect and set out verbatim the accurate rule.

Dated this 17th day of March, 1970.

(Signature)
DAVID R. RICHARDS
CLINTON & RICHARDS
205 Texas AFL-CIO Bldg.
308 West 11th
Austin, Texas 78701

Attorneys for Plaintiffs

(Certificate of Service omitted in printing)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL ACTION NO. A-69-CA-106

(Title omitted in printing)

AFFIDAVIT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

My name is Edwin B. Price and I am over twenty-one years of age and of sound mind. I have never been convicted of a felony or of a crime involving moral turpitude and I have knowledge of the facts stated herein. I am competent to testify to these matters.

I am presently employed by The University of Texas at Austin as a lecturer in Physical and Health Education and as an Assistant Dean of Students. On behalf of the Dean of Students I supervise the carrying out of Chapter 6 and 10 of the Institutional Rules of The University of Texas at Austin. This of necessity requires the application of the Rules and Regulations of the Board of Regents concerning commercial and non-commercial solicitation. In applying these rules to various situations care is taken to make sure that impartiality is maintained.

If a student or organization desires to distribute a leaflet a copy is deposited with my office in compliance with the institutional rules. I review the content of the leaflet to make sure that it is not obscene, vulgar, or libelous or that it does not advocate the deliberate violation of any federal, state, or local law. Furthermore the material must not involve commercial solicitation. If the material complies with these rules its distribution is allowed without further regard to its content.

My duties further require the granting or withhold-

ing of permission to both students and organizations to raise funds. If the purpose of the solicitation or fund raising is "for the needy or suffering, relief of the poor, or for public benevolent purposes" it comes within the non-commercial provision of the Regents Rules and permission is granted. Permission was further given to all student organizations to collect membership dues at registration. If the proposed activity comes within the category of commercial solicitation that is not allowed according to the applicable Regents Rule then permission is not given. Occasionally a printed item might contain a small part involving commercial solicitation and if this part can be in some manner deleted it is done and the item is circulated.

One example of permissible non-commercial solicitation was a balloon sale by a committee of the Students Association in January of this year. The purpose of the sale was mainly to draw attention to the unfortunate circumstances of the poor people in East Austin. Any money made from this sale went to assist these poor people. Another example is a cake and cookie sale by the Home Economics Department. The proceeds from this sale go toward scholarships in that department.

Although this does not come within my duties, I am aware that commercial advertisements appear upon some bulletin boards throughout the campus. The use of such a bulletin board is under the jurisdiction of the college, school, department or administrative official that maintains it. Dr. Norman Hackerman, who is President of The University, has issued a directive to those who maintain these bulletin boards to remove the commercial advertisements. For the most part his directive has been complied with.

If a person is engaged in unauthorized commercial solicitation they are told that this activity is not authorized upon campus. They are told to stop and if they do the matter is closed. If they do not stop they are asked to identify themselves.

(Signature)
EDWIN B. PRICE

(Jurat omitted in printing)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL ACTION NO. A-69-CA-106

(Title omitted in printing)

AFFIDAVIT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

My name is Sandra Gay Ellis and I am presently residing at 1103 West 24th Street in Austin, Travis County, Texas. I am a student at The University of Texas at Austin, over twenty-one years of age, of sound mind and have never been convicted of a felony or a crime involving moral turpitude. I have knowledge of the facts stated herein and I am competent to testify to these matters.

Subsection c of Section 10-301, Subschapter 10-300 of the institutional *Rules and Regulations* of The University of Texas at Austin states, "No student or organization may distribute literature by accosting individuals or by hawking or shouting." I feel this is as it should be. These rules were made for a purpose—to keep students on campus from being bothered by obnoxious solicitors.

Selling The Rag on campus is an obvious violation of the above regulations. And most Rag solicitors I have encountered have indeed been obnoxious. They shout and scream to advertise their presence and I believe many students find this extremely irritating. I certainly do. Just once I'd like to walk across campus between classes without someone shouting "Rag, get your Rag" into my ear or thrusting the paper into my face. The Rag is available anywhere along the Drag, and anyone wanting to purchase it can walk over there

for it. So why do those of us who are offended by the hawker's selling practices have to put up with this sort of thing on campus?

If The Rag wins its court suit to strike down the no commercial solicitation on campus rule, it will set a dangerous precedent because then anyone selling anything could come on campus and annoy students. I think this is better stopped before it starts, even if it does mean a person must walk all the way across the street to get The Rag.

(Signature)
SANDRA GAY ELLIS

(Jurat omitted in printing)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL ACTION NO. A-69-CA-106

(Title omitted in printing)

AFFIDAVIT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

STATE OF TEXAS)
COUNTY OF TRAVIS)

BEFORE ME, the undersigned authority, on this day personally appeared W. O. Shultz, who, after being duly sworn by me, upon his oath did state as follows:

I am over the age of 21 years, am of sound mind, and have never been convicted of a felony or an offense involving moral turpitude. I have personal knowledge of the facts set forth herein and I am fully competent to testify as to the matters stated herein and all of the statements herein are true and correct.

I am one of the attorneys of record for the Defendant in this cause and I am also one of the attorneys of record for the Plaintiff in cause No. 174,116 in the 167th District Court of Travis County, Texas. I represent the Board of Regents of the University of Texas System in both of such actions. The parties Defendant in the 167th District Court are parties Plaintiff in this cause and are members of the class represented by Plaintiffs in this cause. All of the Defendants represented in the 167th District Court are represented by David R. Richards who is the same person who represents all of the Plaintiffs in this cause.

On the 25th day of February, 1970, there came on to be heard before the Court in cause No. 174,116 in

the 167th District Court the Plaintiff's application for temporary injunction. I was personally present at such hearing and represented the Board of Regents. David R. Richards was personally present at such hearing and represented the Defendants therein. David R. Richards, as attorney for the Defendants, cross-examined the witnesses on behalf of said Defendants and introduced certain exhibits as evidence in said cause. At the close of the testimony and evidence David R. Richards presented to the Court argument and authorities to support the pleadings of the Defendants to the effect that Regents' Rules 6.11 and 6.12, as promulgated and as enforced, violated freedoms and rights of the Defendants that are guaranteed and protected by the First and Fourteenth Amendments to the United States Constitution.

Attached to this affidavit are certified and authenticated copies of the Plaintiff's First Amended Original Petition; Defendants' First Amended Answer; and Judgment in cause No. 174,116 in the 167th District Court of Travis County, Texas. None of the Defendants in said cause nor their attorney on their behalf have taken any of the steps necessary to perfect an appeal from that judgment, and such judgment has now become a final adjudication of the constitutional issues raised by Defendants in said cause.

(Signature)
W. O. SHULTZ

SUBSCRIBED AND SWORN TO before me this 9th day of April, 1970.

(Signature)
KAY HAYNES
Notary Public in and for
Travis County, Texas

NO. 174,116

IN THE DISTRICT COURT OF
TRAVIS COUNTY, TEXAS
167TH JUDICIAL DISTRICT

THE BOARD OF REGENTS OF THE
UNIVERSITY OF TEXAS SYSTEM

v.

NEW LEFT EDUCATION PROJECT,
RADICAL MEDIA PROJECT, ET AL.

JUDGMENT

On this 25th day of February, 1970, came on to be heard before the Court the plaintiff's application for temporary injunction in the above entitled and numbered cause, and came the plaintiff by and through its attorneys of record and came the defendants by and through their attorneys of record, and, having heard the evidence and considered the exhibits and argument of counsel the Court is of the opinion and finds as follows:

I find that the Board of Regents of the University of Texas System has promulgated certain rules and regulations pertaining to commercial and noncommercial solicitation on the campus of all of the component institutions of The University of Texas System, including the University of Texas at Austin, and that The University of Texas at Austin has likewise promulgated certain rules and regulations which apply to the sale and distribution of newspapers and publications. I find that all of these rules and regulations cover the sale and distribution of a newspaper that is known as the Rag on the Campus of the University of Texas at Austin.

I find that all of said rules and regulations are reasonable regulations of campus conduct, that said rules

and regulations are not arbitrary nor discriminatory, that said rules are not in violation of the First and Fourteenth Amendments of the United States Constitution, and they do not constitute an unreasonable limitation upon the freedom of speech or freedom of the press. I find that said rules and regulations promulgated and as enforced by plaintiff fully afford defendants the right of free speech and freedom of the press under the First Amendment of the United States Constitution.

I find that defendants had full knowledge of said rules and regulations and their application to the sale of the Rag on the campus of the University of Texas at Austin. I find that defendants, with full knowledge of said rules and regulations, have sold and have distributed for a valuable consideration and have caused to be sold and distributed for a valuable consideration the newspaper publication known as the Rag on the campus of the University of Texas at Austin, in violation of said rules and regulations.

I further find that despite numerous requests from the administrative officials of The University of Texas at Austin, the defendants, their agents and representatives, and others acting in concert with the defendants have refused to refrain from commercially soliciting the sale and distribution of copies of the Rag on the campus of The University of Texas at Austin, and are, in fact, selling the Rag on said campus.

I further find that such sales and distribution have been, and continue to be knowingly and intentionally made in direct violation of said rules and regulations of The University of Texas System, and in direct violation of the rules and regulations of the University of Texas at Austin; that said defendants will continue to sell and distribute, and cause to be sold and dis-

tributed the Rag in violation of such rules and regulations unless restrained by the Court.

I further find that the defendants have no vested legal right to sell and distribute the Rag on the campus of The University of Texas at Austin in violation of the rules and regulations of The University of Texas System, and The University of Texas at Austin, and that such activity is adverse to the best interests of the students, staff and faculty of The University of Texas, and unless such activity is restrained, the defendants will do plaintiff irreparable injury, for which I find there is no adequate administrative remedy, nor is there an adequate remedy at law;

Therefore, it is Ordered, Adjudged and Decreed that the temporary injunction be, and hereby is, granted as prayed for by the plaintiff and that the defendants and persons acting in concert with the defendants be, and they are, temporarily restrained and enjoined from selling or distributing the newspaper known as the Rag upon the campus of The University of Texas at Austin and from making any other commercial or non-commercial solicitation on the campus of The University of Texas at Austin, except in compliance with the rules and regulations of the University of Texas at Austin, and rules and regulations of the Board of Regents of The University of Texas System.

Signed and entered this 26th day of February, 1970.

(Signature)
TOM BLACKWELL, Judge
167th Judicial District Court
Travis County, Texas

THE STATE OF TEXAS)
COUNTY OF TRAVIS)

I, O. T. MARTIN, JR., Clerk of the District Courts, within and for the State and County aforesaid, do hereby certify that the within and foregoing is a true and correct copy of JUDGMENT in Cause No. 174,116, wherein The Board of Regents of the University of Texas System is Plaintiff, and New Left Education Project, Radical Media Project, et al., are Defendants, as the same appears on file and of record in this office.

Given under my hand and seal of office at Austin, Texas, this the 31st day of March, 1970.

O. T. MARTIN, JR.
Clerk, District Courts, Travis County, Texas

By-------- (Signed Cecelia Adair) --------
Deputy

STATE OF TEXAS)
COUNTY OF TRAVIS)

I, Tom Blackwell, Judge of the 167th District Court do hereby certify that O. T. Martin, Jr., is the duly elected, qualified, and acting Clerk of this Court, that he is the custodian of the records of this Court, and that the attestation which he has attached to the foregoing records in Cause No. 174,116 before this Court is in due form according to the laws and practice of the State of Texas and this Court.

Signed and certified to this 31st day of March, 1970.

(Signature)
TOM BLACKWELL, Judge
167th Judicial District

NO. 174,116

IN THE DISTRICT COURT
OF TRAVIS COUNTY, TEXAS
167TH JUDICIAL DISTRICT

THE BOARD OF REGENTS OF THE
UNIVERSITY OF TEXAS SYSTEM
v.
NEW LEFT EDUCATION PROJECT,
RADICAL MEDIA PROJECT, PAUL SPENCER
and NANCY SWEENY, ET AL.

DEFENDANTS' FIRST AMENDED ANSWER

Come now the following Defendants, New Left Education Project, a registered student organization at the University of Texas at Austin, Clyde Alan Locklear, Nancy Sweeny, James Caldwell, Patricia Cuney, David Waddington and Larry Neil Winn, and in response to Plaintiff's Amended Petition would respectfully show:

I.

Defendants respectfully urge that this matter be held in abatement pending resolution of the pending civil action styled *New Left Education Project, et al. v. Board of Regents of the University of Texas System,* being Civil Action No. A-69-CA-106, in the United States District Court for the Western District of Texas, Austin Division, wherein these selfsame Defendants seek injunctive relief against the Plaintiffs herein restraining them from further prosecution of this cause on the ground that prosecution of this cause constitutes an unwarranted intrusion upon First Amendment rights. Defendants urge that this matter be abated and held in abeyance pending resolution of the issues presented in the pending federal action.

II.

Without waiving the foregoing Plea in Abatement, Defendants urge that this matter be dismissed on the ground of primary jurisdiction, in that primary and initial responsibility for the enforcement of regulations which the Plaintiffs seeks this Court to enforce resides in the Plaintiff itself, i.e. the Board of Regents of the University of Texas, and it is neither timely nor appropriate for Plaintiff to seek to impose upon this Court the burden of enforcing its own regulations, regulations which it has not seen fit itself to enforce.

III.

Subject to the foregoing pleas, Defendants specially deny that Plaintiff has suffered, or will suffer in the future, irreparable harm or injury or that it is without adequate remedy of law.

IV.

By way of further answer, Defendants assert that the Plaintiff by its efforts to prohibit the distribution of "the Rag" is engaged in discriminatory application of its rules and regulations in violation of the First and Fourteenth Amendments to the United States Constitution.

V.

By way of further answer Defendants assert that the regulations which Plaintiff seeks to enforce infringe upon First Amendment guarantees constituting an unreasonable limitation upon free speech and press.

VI.

Subject to the foregoing pleas and motion, Defendants deny each and every all and singular the allegations of Plaintiff's Original Petition.

WHEREFORE, premises considered, Defendants respectfully pray that Plaintiff take nothing by its action.

(Signature)
DAVID R. RICHARDS
CLINTON & RICHARDS
205 Texas AFL-CIO Bldg.
308 West 11th
Austin, Texas 78701

Attorneys for Defendants

(Certificate of Service omitted in printing)

THE STATE OF TEXAS)
COUNTY OF TRAVIS)

I, O. T. MARTIN, JR., Clerk of the District Courts, within and for the State and County aforesaid, do hereby certify that the within and foregoing is a true and correct copy of DEFENDANTS' FIRST AMENDED ANSWER in Cause No. 174,116, wherein The Board of Regents of The University of Texas System is Plaintiff, and New Left Education Project, Radical Media Project, Paul Spencer and Nancy Sweeny, et al. are Defendants, as the same appears on file and of record in this office.

Given under my hand and seal of office at Austin, Texas, this the 31st day of March, 1970.

O. T. MARTIN, JR.
Clerk, District Courts, Travis County, Texas

By-------- (Signed Cecelia Adair) --------
Deputy

STATE OF TEXAS)
COUNTY OF TRAVIS)

I, Tom Blackwell, Judge of the 167th District Court do hereby certify that O. T. Martin, Jr., is the duly elected, qualified, and acting Clerk of this Court, that he is the custodian of the records of this Court, and that the attestation which he has attached to the foregoing records in Cause No. 174,116 before this Court is in due form according to the laws and practice of the State of Texas and this Court.

Signed and certified to this 31st day of March, 1970.

(Signature)
TOM BLACKWELL, Judge
167th Judicial District

NO. 174,116

IN THE DISTRICT COURT
OF TRAVIS COUNTY, TEXAS
167TH JUDICIAL DISTRICT

THE BOARD OF REGENTS OF THE
UNIVERSITY OF TEXAS SYSTEM

v.

NEW LEFT EDUCATION PROJECT,
RADICAL MEDIA PROJECT, PAUL SPENCER
and NANCY SWEENY, ET AL.

PLAINTIFF'S FIRST AMENDED ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Board of Regents of The University of Texas System, an agency of the State of Texas, and with leave of the Court files this Plaintiff's First Amended Original Petition for injunction, as Plaintiff, complaining of the New Left Education Project, a registered student organization at The University of Texas at Austin, and its President, Clyde Alan Locklear; the Radical Media Project, a registered student organization at The University of Texas at Austin, and its President, Gary Thiher; Paul Spencer; Nancy Sweeny, James Caldwell, Patricia Cuney, David Waddington, Larry Neil Winn, Stephen Wayne Russell, Judy Hart Smith, Linda Louise Smith, John Lane, Peter Kwant, Richard LeClaire, Bill Meecham, Doyle Nieman, Bride Murphy, Mike Hanson, Jeff Jones, Fred Hanson, and other persons of a class whose names are not immediately known to Plaintiff but whose activities are hereinafter more fully described, as Defendants, each of whom resides at this

time in Austin, Travis, County, Texas, insofar as the Plaintiff is able to ascertain.

I.

Plaintiff is the governing body of a state institution of higher education existing under and by virtue of the Constitution and statutes of the State of Texas and is governed by a Board of Regents, whose Chairman is Frank C. Erwin, Jr., of Austin, Travis County, Texas.

II.

That the Defendant, Clyde Alan Locklear, resides in Austin, Travis County, Texas, at 707½ West Lynn; that the Defendant, Gary Thiher, resides in Austin, Travis County, Texas, at 405 West 12th Street; that Defendant, Paul Spencer, resides in Austin, Travis County, Texas, at 4301 East Avenue; that the Defendant, Nancy Sweeny, resides in Austin, Travis County, Texas, at 2323 San Antonio; that the Defendant, James Caldwell, resides in Austin, Travis County, Texas, at 1800 Rio Grande; that the Defendant, Patricia Cuney, resides in Austin, Travis County, Texas, at 909-B West 21st street; that the Defendant, David Waddington, resides in Austin, Travis County, Texas, at 2612 Guadalupe, Apartment 305; that the Defendant, Larry Neil Winn, resides in Austin, Travis County, Texas, at 3404 Grooms; that the Defendant, Stephen Wayne Russell, resides in Austin, Travis County, Texas, at 2200 Guadalupe; that the Defendant, Judy Hart Smith, resides in Austin, Travis County, Texas; at 3109 Owen Street; that the defendant, Linda Louise Smith, resides in Austin, Travis County, Texas, at 2307 Longview; that the remainder of the Defendants named above are residents of Austin, Travis County, Texas, at addresses that are presently unknown to

Plaintiff; that service of process may be had on the foregoing Defendants at the foregoing addresses.

III.

Plaintiff is the governing body of The University of Texas at Austin, an institution of higher education established pursuant to the laws of the State of Texas. The University of Texas at Austin has been operated as an institution of higher education at all times. The University of Texas at Austin, a component institution of The University of Texas System, is located in the City of Austin, Travis County, Texas, and is situated primarily between Guadalupe Street on the West, 27th Street on the North, Red River Street on the East, and 19th Street on the South. There are approximately 35,678 students presently attending The University of Texas at Austin. The University maintains dormitories, study halls, libraries, classrooms, and various other buildings and facilities for the primary and exclusive benefit of its students, as well as for the faculty and staff of the University. The University also engages in research projects and projects in experimentation and development.

IV.

That Defendants, and each of them, are selling and distributing for a valuable consideration or causing to be sold and distributed for a valuable consideration a newspaper known as "The Rag," and have from time to time sold and distributed or caused to be sold and distributed for a valuable consideration copies of "The Rag" on the campus of The University of Texas at Austin in violation of the rules and regulations of the Board of Regents of The University of Texas System. Plaintiff is also reliably informed and has reason to believe and does believe that "The Rag"

has been and will be sold and distributed or caused to be sold and distributed for a valuable consideration by these Defendants and others acting in concert with the Defendants.

V.

The Board of Regents of The University of Texas System has promulgated certain rules and regulations pertaining to commercial and noncommercial solicitations on the campus of any component institution of The University of Texas System, which said rules and regulations apply to the sale and distribution of newspapers and publications on the campus of any component institution of The University of Texas System, and such rules and regulations are set forth as follows:

Regents' Rules and Regulations, Chapter VI, Part One

6.11 Commercial solicitations will not be authorized on the campus of any component institution of The University of Texas System, except as otherwise provided in this section. Commercial solicitations include the sale, contract of sale, advertisement or promotion for sale, disposition of or contract to dispose of any item of personal property; the inducement of any person, group, or organization to contract with regard to any item of personal property, service, or anything that the offerer may offer; or the solicitation of funds or personal property. The following commercial solicitations are permissible:

(1) commercial solicitations in a Student Union Building that have been approved by the Board of Directors or by the appropriate union governing body subject to applicable institutional rules and regulations and applicable Regents' Rules and Regulations;

(2) the sale of any authorized student publication or any publication authorized by any agency of a component institution;

(3) any commercial solicitation made pursuant to a contract or agreement between the administration of a component institution and the vendor;

(4) the sale of any newspaper or other publication by means of a vending machine located in a campus building, if a certain area or areas within a campus building have been designated in advance by the institutional head or his representative as appropriate for such sales; and

(5) any commercial solicitation necessary for the normal administration, operation, and maintenance of any component institution as an educational institution.

6.12 No noncommercial solicitations, including fund raising for charity, shall be permitted on a campus of a component institution of The University of Texas System without the prior approval of the institutional head or his delegate.

6.121 Such approval by the institutional head may be granted for solicitation or fund raising for the needy or suffering, relief of the poor, or for public benevolent purposes, but it may not be granted for the personal benefit of an individual, group, or registered student organization, to pay for monetary indebtedness incurred by an individual, group, or registered student organization, or to pay any fee, fine, or other charge arising from a violation of federal, state, or local law.

6.122 Any noncommercial solicitation, including fund raising for charity, that is approved by the institutional head or his delegate shall be conducted in accordance with reasonable institutional regulations regarding time, place, procedure and financial reporting and accountability.

6.123 Notwithstanding the provisions of Section 6.121 above, with the approval of the institutional head or his delegate, a registered student organization may solicit or raise funds from its own members for the benefit of the organization but only at official meetings of the organization.

That prior to September 12, 1969, said rules and regulations pertaining to commercial and noncommercial solicitation on the campus of any component institution of The University of Texas System provided as follows:

Regents' Rules and Regulations, Chapter VI, Part One

6.11 Commercial solicitations will not be authorized on the campus of any component institution of The University of Texas System, unless prior approval has been granted by the institutional head or his representative. Commercial solicitations include the sale, contract of sale, advertisement or promotion for sale, disposition of or contract to dispose of any item of personal property; the inducement of any person, group, or organization to contract with regard to any item of personal property, service, or anything that the offerer may offer; or the solicitation of funds or personal property. Except as otherwise provided in this section.

6.12 No noncommercial solicitations, including fund raising for charity, shall be permitted on a campus of a component institution of The University of Texas System without the prior approval of the institutional head or his delegate.

6.121 Such approval by the institutional head may be granted for solicitation or fund raising for the needy or suffering, relief of the poor, or for public benevolent purposes, but it may not be granted for the personal benefit of an individual, group, or registered student organization, to pay for monetary indebtedness incurred by an individual, group, or registered student

organization, or to pay any fee, fine, or other charge arising from a violation of federal, state, or local law.

6.122 Any noncommercial solicitation, including fund raising for charity, that is approved by the institutional head or his delegate shall be conducted in accordance with reasonable institutional regulations regarding time, place, procedure and financial reporting and accountability.

6.123 Notwithstanding the provisions of Section 6.121 above, with the approval of the institutional head or his delegate, a registered student organization may solicit or raise funds from its own members for the benefit of the organization but only at official meetings of the organization.

VI.

In accordance with the rules and regulations set out in Paragraph V, the institutional head of The University of Texas at Austin has designated certain areas within campus buildings as available for the sale of newspapers and other publications by means of vending machines. The following areas have been designated:

(1) The vending room of the Texas Union (by virtue of action of the Board of Directors of the Texas Union, approved by the Board of Regents);

(2) The second floor foyer (crossover) between the office and classroom wings of the Business Administration-Economics Building;

(3) The entrance hall to the Law School snack bar (room 135) in Townes Hall; and

(4) The Jester Center Store.

Despite numerous requests from administrative officials of The University of Texas at Austin, the Defendants, their agents and representatives, and others acting in concert with Defendants, have refused to refrain from commercially soliciting the sale and distribution of copies of "The Rag" on the campus of The University of Texas at Austin and are in fact selling "The Rag" in areas of the campus other than those areas designated by the institutional head. Such sales and distribution have been and continue to be in direct violation of existing rules and regulations of

The University of Texas System and The University of Texas at Austin, and the Defendants will continue to sell and distribute, or cause to be sold and distributed as aforesaid, "The Rag" in violation of such rules and regulations unless restrained by this Court.

VII.

The Defendants and each of them have no vested legal right to sell and distribute "The Rag" in violation of the rules and regulations of The University of Texas System and The University of Texas at Austin, which activity, when conducted without permission, is adverse to the best interests of the students, staff, and faculty of The University of Texas System, and unless such activity is restrained, Defendants will do Plaintiff irreparable injury for which there is no adequate remedy at law.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that the Defendants and persons acting in concert with Defendants be temporarily restrained and enjoined from selling and distributing for consideration or otherwise the newspaper known as "The Rag" and from making any other commercial or noncommercial solicitation on the campus of The University of Texas at Austin except in compliance with the rules and regulations of The University of Texas at Austin and the Board of Regents of The University of Texas System, and be restrained and enjoined from doing any other act tending to interfere with the normal educational processes at such institution; that Defendants be cited to appear and answer this petition. That upon the hearing for temporary injunction, a temporary injunction be granted to continue in effect until final hearing on the merits; and that on final hearing the said injunction

be made perpetual against all Defendants; and Plaintiff prays for such other and further relief and orders as the Court may deem proper.

CRAWFORD C. MARTIN
Attorney General of Texas

PAT BAILEY
Assistant Attorney General

(Signature)
W. O. SHULTZ
Assistant Attorney General
Capitol Station
Austin, Texas 78711

Attorneys for Plaintiff

STATE OF TEXAS)
COUNTY OF TRAVIS)

BEFORE ME, the undersigned authority, on this day personally appeared W. O. Shultz, who after being by me duly sworn did depose and say that he is an attorney of record for the Plaintiff and that he is authorized to make this affidavit and that the allegations contained in the Plaintiff's First Amended Original Petition are true and correct.

(Signature)
W. O. SHULTZ

SWORN TO AND SUBSCRIBED before me this 19th day of November, 1969.

(Signature)
KAY HAYNES
Notary Public in and for
Travis County, Texas

THE STATE OF TEXAS)
COUNTY OF TRAVIS)

I, O. T. MARTIN, JR., Clerk of the District Courts, within and for the State and County aforesaid, do hereby certify that the within and foregoing is a true and correct copy of PLAINTIFF'S FIRST AMENDED ORIGINAL PETITION in Cause No. 174,116, wherein The Board of Regents of the University of Texas System is Plaintiff, and New Left Education Project, Radical Media Project, Paul Spencer and Nancy Sweeny, et al. are Defendants, as the same appears on file and of record in this office.

Given under my hand and seal of office at Austin, Texas, this the 31st day of March, 1970.

O. T. MARTIN, JR.
Clerk, District Courts, Travis County, Texas

By-------- (Signed Cecelia Adair) --------
Deputy

STATE OF TEXAS)
COUNTY OF TRAVIS)

I, Tom Blackwell, Judge of the 167th District Court do hereby certify that O. T. Martin, Jr., is the duly elected, qualified, and acting Clerk of this Court, that he is the custodian of the records of this Court, and that the attestation which he has attached to the foregoing records in Cause No. 174,116 before this Court is in due form according to the laws and practice of the State of Texas and this Court.

Signed and certified to this 31st day of March, 1970.

(Signature)
TOM BLACKWELL, Judge
167th Judicial District

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL ACTION NO. A-69-CA-106

(Title omitted in printing)

SECOND AMENDED ANSWER OF THE DEFENDANT, BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM

TO THE HONORABLE JUDGES OF SAID COURT:

Defendant, Board of Regents of the University of Texas System, in reply to Plaintiffs' First Amended Complaint, files this its Second Amended Answer, and would respectfully show the Court as follows:

FIRST DEFENSE

The complaint fails to state a claim against the Defendant upon which relief can be granted.

SECOND DEFENSE

To the extent that the complaint seeks injunctive relief, this Court lacks jurisdiction by virtue of 28 U.S.C. §2283. To the extent that it seeks declaratory relief, it invokes the discretion of the Court under 28 U.S.C. §2201 and this Court, in its discretion, should decline to exercise that jurisdiction and should dismiss the action because all of the issues sought to be raised by Plaintiffs can be fully resolved in the prior civil proceedings against them now pending in the 167th District Court of the State of Texas.

THIRD DEFENSE

A. Defendant denies the allegations contained in

Paragraphs I, IVB, IVE, IVJ, IVK, IVL, IVM and V of Plaintiffs' First Amended Complaint.

B. Defendant admits the allegations of the first sentence of Paragraph IIA of Plaintiffs' First Amended Complaint, but denies the remainder of said paragraph.

C. Defendant admits the allegation contained in Paragraph IIB of Plaintiffs' Complaint that this action seeks a declaration under 28 U.S.C., §2201 and 2202 that certain rules and regulations maintained by the Defendant are unconstitutional, but the Defendant denies that portion of Paragraph IIB of the Plaintiffs' Complaint wherein it is alleged that such rules and regulations are unconstitutional because they unduly restrict first amendment freedoms of the Plaintiffs and that said regulations constitute an unwarranted limitation on free expression.

D. Defendant admits the allegations of the first two sentences of Paragraph IIIA of Plaintiffs' First Amended Complaint, except that Defendant denies that a true copy of Defendant's current pleadings in Cause No. 174,116 in the 167th District Court of Travis County, Texas, are attached to Plaintiffs' Original Complaint, and defendant further denies the remainder of the allegations of said paragraph.

E. Defendant is without knowledge sufficient to form a belief as to the truth of the allegations of Paragraph IIIB of Plaintiffs' First Amended Complaint.

F. Defendant admits the first sentence of Paragraph IIIC of Plaintiffs' First Amended Complaint, but is without knowledge sufficient to form a belief as to the truth of the remainder of the allegations of said paragraph.

G. Defendant admits the allegations of Paragraph IIID of Plaintiffs' First Amended Complaint, with the exception that Defendant denies that the members of the Board of Regents of the University of Texas System have been served with process in this cause in their individual capacities.

H. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph IVA of Plaintiffs' First Amended Complaint.

I. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first two sentences of Paragraph IVC of Plaintiffs' First Amended Complaint. With regard to the remainder of the allegations of said paragraph, Defendant admits that the Young Democratic Club has been permitted to solicit dues from its members upon the campus at the University of Texas at Austin but denies that such solicitation of dues has been permitted at any place or time other than at registration periods; Defendant further denies the allegations of the last sentence of said paragraph.

J. Defendant denies the allegations of the last sentence of Paragraph IVD of Plaintiffs' First Amended Complaint and is without knowledge or information sufficient to form a belief as to the truth of the remainder of the allegations of said paragraph.

K. Defendant admits the allegations of the first sentence of Paragraph IVF of Plaintiffs' First Amended Complaint and denies the remainder of the allegations of said paragraph.

L. Defendant admits the allegation of Paragraph IVG of Plaintiffs' First Amended Complaint that Defendant is maintaining a suit in 167th District Court

of Travis County, Texas, but denies that the full text of such actions is appended to Plaintiffs' Original Complaint; Defendant denies all other allegations of said paragraph, except that Defendant admits that it is and has been enforcing Regents Rule 6.11 against those who engage in commercial solicitation of "The Rag" on the campus of the University of Texas at Austin.

M. Defendant admits the allegations of Paragraph IVH of Plaintiffs' First Amended Complaint.

N. Defendant admits the allegations of Paragraph IVI of Plaintiffs' First Amended Complaint with regard to the enforcement of its rules and regulations but deny that said rules and regulations or their enforcement are unconstitutional limitations upon anyone's rights.

FOURTH DEFENSE

I.

The Board of Regents of the University of Texas System has promulgated the following rules and regulations relating to solicitations upon the campuses of the component institutions of the System including the University of Texas at Austin:

Regents' Rules and Regulations, Chapter VI, Part One

6.11 Commercial solicitations will not be authorized on the campus of any component institution of The University of Texas System, except as otherwise provided in this section. Commercial solicitations include the sale, contract of sale, advertisement or promotion for sale, disposition of or contract to dispose of any item of personal property; the inducement of any person, group, or organization to contract with regard to any item of personal property, service, or anything that the offerer may offer; or the solicitation of funds or personal property. The following commercial solicitations are permissible:

(1) commercial solicitations in a Student Union Building that have been approved by the Board of Directors or by the appropriate union governing body subject to applicable institutional rules and regulations and applicable Regents' Rules and Regulations;

(2) the sale of any authorized student publication or any publication authorized by any agency of a component institution;

(3) any commercial solicitation made pursuant to a contract or agreement between the administration of a component institution and the vendor;

(4) the sale of any newspaper or other publication by means of a vending machine located in a campus building, if a certain area or areas within a campus building have been designated in advance by the institutional head or his representative as appropriate for such sales; and

(5) any commercial solicitation necessary for the normal administration, operation, and maintenance of any component institution as an educational institution.

6.12 No noncommercial solicitations, including fund raising for charity, shall be permitted on a campus of a component institution of The University of Texas System without the prior approval of the institutional head or his delegate.

6.121 Such approval by the institutional head may be granted for solicitation or fund raising for the needy or suffering, relief of the poor, or for public benevolent purposes, but it may not be granted for the personal benefit of an individual, group, or registered student organization, to pay for monetary indebtedness incurred by an individual, group, or registered student organization, or to pay any fee, fine, or other charge arising from a violation of federal, state, or local law.

6.122 Any noncommercial solicitation, including fund raising for charity, that is approved by the institutional head or his delegate shall be conducted in accordance with reasonable institutional regulations regarding time, place, procedure and financial reporting and accountability.

6.123 Notwithstanding the provisions of Section 6.121 above, with the approval of the institutional head or his delegate, a registered student organization may solicit or raise funds from its own members for the benefit of the organization but only at official meetings of the organization.

II.

Plaintiffs have failed to allege in their complaint that they or the class they represent have attempted to comply with the foregoing rules and regulations of the Defendant.

III.

Plaintiffs have failed to allege why all of the issues raised by the suit in this proceeding cannot be raised as issues in the action brought by Defendant in the 167th District Court of Travis County, Texas.

IV.

Plaintiffs have failed to allege or show that this action constitutes anything more than a multiplicity of suits involving the same issues already involved in the 167th District Court of Travis County, Texas.

V.

Defendant alleges that the Plaintiff, Young Socialist Alliance, obtained permission from the Board of Directors of the Student Union of The University of Texas at Austin to sell and distribute certain literature within the Student Union but that such Plaintiff exceeded such permission and sold and distributed said literature upon the West Mall of the campus of The University of Texas at Austin in violation of Regents Rule 6.11.

VI.

Defendant alleges that Regents Rule 6.124 now in effect throughout The University of Texas System permits registered organizations to solicit membership and dues during periods of registration at the places set aside for registration of students for The University of Texas System. The Plaintiff, The Young Democratic Club, and other registered student organizations were permitted to solicit, and did solicit, membership and dues at the registration of students for the Spring Semester of 1970 upon the campus of The University of Texas at Austin.

FIFTH DEFENSE

I.

That on the 25th day of February, 1970, in Cause No. 174,116 in the 167th District Court of Travis County, Texas, in which the Board of Regents of

The University of Texas System is Plaintiff and New Left Education Project, Radical Media Project, Clyde Alan Locklear, Nancy Sweeny, James Caldwell, Patricia Cuney, David Waddington, Larry Neil Winn, and others are Defendants, came on to be heard the Plaintiff's application for temporary injunction to enjoin Defendants and all others acting in concert with them from selling and distributing a newspaper known as "The Rag" on the campus of The University of Texas at Austin in violation of Rules 6.11 and 6.12 of the Regents' Rules and Regulations, Chapter VI, Part One. After direct and cross-examination of witnesses, introduction of evidence, argument and presentation of legal authorities by counsel for both parties, the Court entered its judgment enjoining defendants and all others acting in concert with them from selling or distributing "The Rag" or from making any other commercial or noncommercial solicitation upon the campus of The University of Texas at Austin except in conformity with the rules and regulations of the Board of Regents of The University of Texas System.

II.

That certified copies of the Plaintiff's First Amended Original Petition, Defendants' First Amended Answer, and the Judgment of the 167th District Court of Travis County, Texas, in Cause No. 174,116 are attached hereto and made a part hereof for all purposes.

III.

That New Left Education Project, Clyde Alan Locklear, Nancy Sweeny, James Caldwell, Patricia Cuney, David Waddington, and Larry Neil Winn are Plaintiffs in this cause and are defendants in Cause No.

174,116 in the 167th District Court of Travis County, Texas, and the fact that said parties are identical in each cause affirmatively appears from their pleadings in each cause.

IV.

That in the cause before this Court it affirmatively appears from Plaintiffs' Motion for Leave to Amend; First Amended Complaint; the Order entered by this Court on the 17th day of December, 1969; Motion for Leave to Intervene; Order Granting Leave to Intervene entered on the 10th day of February, 1970, that the plaintiffs are all members of a class and all assert an action based upon common questions of law and fact which arise out of the same series of occurrences. It further appears that the action asserted by such Plaintiffs and the class they represent is an assertion that Rules 6.11 and 6.12 of the Regents' Rules and Regulations, Chapter VI, Part One as promulgated and as enforced violate the freedoms and rights of the Plaintiffs and the class they represent as guaranteed and protected by the First and Fourteenth Amendments to the United States Constitution.

V.

That it affirmatively appears from the Defendants' First Amended Answer that Defendants in Cause No. 174,116 in the 167th District Court of Travis County, Texas, specifically plead that the rules and regulations sought to be enforced in said cause were in violation of Defendants freedoms and rights guaranteed and protected by the First and Fourteenth Amendments to the United States Constitution. It further appears from the pleadings in both actions that the Plaintiffs in this cause and the Defendants in the aforesaid cause in the 167th District Court of Travis County, Texas,

are, and were, represented by the same attorney. It further appears that the Court in Cause No. 174,116 in the 167th District Court of Travis County, Texas, considered and passed upon the constitutionality of Rules 6.11 and 6.12 of the Regents' Rules and Regulations, Chapter IV, Part One, and specifically recited in its Judgment that said rules as promulgated and as enforced did not violate rights and freedoms of the Defendants as guaranteed and protected by the First and Fourteenth Amendments to the United States Constitution.

VI.

That the Judgment in Cause No. 174,116 in the 167th District Court of Travis County, Texas, has not been appealed from and the time for perfecting an appeal has expired. That said Judgment constitutes a final adjudication as to the constitutionality of Regents Rules 6.11 and 6.12 with regard to the First and Fourteenth Amendments to the United States Constitution. That said Judgment is entitled to full faith and credit, and under the doctrine of res judicata, the doctrine of estoppel, and/or the doctrine of representation, said Judgment precludes the Defendants in that cause and all others who are members of the class of which said Defendants are representative from again litigating in this Court or any other court, the constitutionality of Regents Rules 6.11 and 6.12 with regard to the First and Fourteenth Amendments to the United States Constitution upon the basis of an asserted action which admittedly arises out of the same series of occurrences and involved the same questions of law and fact.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that this action be dismissed and that

all relief prayed for by Plaintiffs be in all things denied.

CRAWFORD C. MARTIN
Attorney General of Texas

(Signature)
W. O. SHULTZ
Assistant Attorney General

PAT BAILEY
Assistant Attorney General
Capitol Station
Austin, Texas 78711

Attorneys for Defendant

(Certificate of Service omitted in printing)

NO. 174,116

IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS
167TH JUDICIAL DISTRICT

THE BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM

v.

NEW LEFT EDUCATION PROJECT, RADICAL MEDIA PROJECT, ET AL.

JUDGMENT

On this 25th day of February, 1970, came on to be heard before the Court the plaintiff's application for temporary injunction in the above entitled and numbered cause, and came the plaintiff by and through its attorneys of record and came the defendants by and through their attorneys of record, and, having heard the evidence and considered the exhibits and argument of counsel the Court is of the opinion and finds as follows:

I find that the Board of Regents of the University of Texas System has promulgated certain rules and regulations pertaining to commerial and noncommercial solicitation on the campus of all of the component institutions of The University of Texas System, including the University of Texas at Austin, and that The University of Texas at Austin has likewise promulgated certain rules and regulations which apply to the sale and distribution of newspapers and publications. I find that all of these rules and regulations cover the sale and distribution of a newspaper that is known as the Rag on the Campus of the University of Texas at Austin.

I find that all of said rules and regulations are reasonable regulations of campus conduct, that said rules and regulations are not arbitrary nor discriminatory, that said rules are not in violation of the First and Fourteenth Amendments of the United States Constitution, and they do not constitute an unreasonable limitation upon the freedom of speech or freedom of the press. I find that said rules and regulations promulgated and as enforced by plaintiff fully afford defendants the right of free speech and freedom of the press under the First Amendment of the United States Constitution.

I find that defendants had full knowledge of said rules and regulations and their application to the sale of the Rag on the campus of the University of Texas at Austin. I find that defendants, with full knowledge of said rules and regulations, have sold and have distributed for a valuable consideration and have caused to be sold and distributed for a valuable consideration the newspaper publication known as the Rag on the campus of the University of Texas at Austin, in violation of said rules and regulations.

I further find that despite numerous requests from the administrative officials of The University of Texas at Austin, the defendants, their agents and representatives, and others acting in concert with the defendants have refused to refrain from commercially soliciting the sale and distribution of copies of the Rag on the campus of The University of Texas at Austin, and are, in fact, selling the Rag on said campus.

I further find that such sales and distribution have been, and continue to be knowingly and intentionally made in direct violation of said rules and regulations of The University of Texas System, and in direct

violation of the rules and regulations of the University of Texas at Austin; that said defendants will continue to sell and distribute, and cause to be sold and distributed the Rag in violation of such rules and regulations unless restrained by the Court.

I further find that the defendants have no vested legal right to sell and distribute the Rag on the campus of The University of Texas at Austin in violation of the rules and regulations of The University of Texas System, and The University of Texas at Austin, and that such activity is adverse to the best interest of the studetns, staff and faculty of The University of Texas, and unless such activity is restrained, the defendants will do plaintiff irreparable injury, for which I find there is no adequate administrative remedy, nor is there an adequate remedy at law;

Therefore, it is Ordered, Adjudged and Decreed that the temporary injunction be, and hereby is, granted as prayed for by the plaintiff and that the defendants and persons acting in concert with the defendants be, and they are, temporarily restrained and enjoined from selling or distributing the newspaper known as the Rag upon the campus of The University of Texas at Austin and from making any other commercial or non-commercial solicitation on the campus of The University of Texas at Austin, except in compliance with the rules and regulations of the University of Texas at Austin, and rules and regulations of the Board of Regents of The University of Texas System.

Signed and entered this 26th day of February, 1970.

(Signature)
TOM BLACKWELL, Judge
167th Judicial District Court
Travis County, Texas

THE STATE OF TEXAS)
COUNTY OF TRAVIS)

I, O. T. MARTIN, JR., Clerk of the District Court, within and for the State and County aforesaid, do hereby certify that the within and foregoing is a true and correct copy of JUDGMENT in Cause No. 174,116, wherein The Board of Regents of the University of Texas System is Plaintiff, and New Left Education Project, Radical Media Project, et al., are Defendants, as the same appears on file and of record in this office.

Given under my hand and seal of office at Austin, Texas, this the 31st day of March, 1970.

O. T. MARTIN, JR.
Clerk, District Courts, Travis County, Texas

By-------- (Signed Cecelia Adair) --------
Deputy

STATE OF TEXAS)
COUNTY OF TRAVIS)

I, Tom Blackwell, Judge of the 167th District Court do hereby certify that O. T. Martin, Jr., is the duly elected, qualified, and acting Clerk of this Court, that he is the custodian of the records of this Court, and that the attestation which he has attached to the foregoing records in Cause No, 174,116 before this Court is in due form according to the laws and practice of the State of Texas and this Court.

Signed and certified to this 31st day of March, 1970.

(Signature)
TOM BLACKWELL, Judge
167th Judicial District

NO. 174,116

IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS
167TH JUDICIAL DISTRICT

THE BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM

v.

NEW LEFT EDUCATION PROJECT, RADICAL MEDIA PROJECT, PAUL SPENCER AND NANCY SWEENY, ET AL.

DEFENDANTS' FIRST AMENDED ANSWER

Come now the following Defendants, New Left Education Project, a registered student organization at the University of Texas at Austin, Clyde Alan Locklear, Nancy Sweeny, James Caldwell, Patricia Cuney, David Waddington and Larry Neil Winn, and in response to Plaintiff's Amended Petition would respectfully show:

I.

Defendants respectfully urge that this matter be held in abatement pending resolution of the pending civil action styled *New Left Education Project, et al. v. Board of Regents of the University of Texas System,* being Civil Action No. A-69-CA-106, in the United States District Court for the Western District of Texas, Austin Division, wherein these selfsame Defendants seek injunctive relief against the Plaintiffs herein restraining them from further prosecution of this cause on the ground that prosecution of this cause constitutes an unwarranted intrusion upon First Amendment rights. Defendants urge that this matter be abated and held in abeyance pending resolution of the issues presented in the pending federal action.

II.

Without waiving the foregoing Plea in Abatement, Defendants urge that this matter be dismissed on the ground of primary jurisdiction, in that primary and initial responsibility for the enforcement of regulations which the Plaintiff seeks in this Court to enforce resides in the Plaintiff itself, i.e. the Board of Regents of the University of Texas, and it is neither timely nor appropriate for Plaintiff to seek to impose upon this Court the burden of enforcing its own regulations, regulations which it has not seen fit itself to enforce.

III.

Subject to the foregoing pleas, Defendants specially deny that Plaintiff has suffered, or will suffer in the future, irreparable harm or injury or that it is without adequate remedy of law.

IV.

By way of further answer, Defendants assert that the Plaintiff by its efforts to prohibit the distribution of "the Rag" is engaged in discriminatory application of its rules and regulations in violation of the First and Fourteenth Amendments to the United States Constitution.

V.

By way of further answer Defendants assert that the regulations which Plaintiff seeks to enforce infringe upon First Amendment guarantees constituting an unreasonable limitation upon free speech and press.

VI.

Subject to the foregoing pleas and motion, Defendants deny each and every all and singular the allegations of Plaintiff's Original Petition.

WHEREFORE, premises considered, Defendants respectfully pray that Plaintiff take nothing by its action.

(Signature)
DAVID R. RICHARDS
CLINTON & RICHARDS
205 Texas AFL-CIO Bldg.
308 West 11th
Austin, Texas 78701

Attorneys for Defendants

(Certificate of Service omitted in printing)

THE STATE OF TEXAS)
COUNTY OF TRAVIS)

I, O. T. MARTIN, JR., Clerk of the District Court, within and for the State and County aforesaid, do hereby certify that the within and foregoing is a true and correct copy of DEFENDANTS' FIRST AMENDED ANSWER in Cause No. 174,116, wherein The Board of Regents of The University of Texas System is Plaintiff, and New Left Education Project, Radical Medial Project, Paul Spencer and Nancy Sweeny, et al. are Defendants, as the same appears on file and of record in this office.

Given under my hand and seal of office at Austin, Texas, this the 31st day of March, 1970.

O. T. MARTIN, JR.
Clerk, District Courts, Travis County, Texas

By-------- (Signed Cecelia Adair) --------
Deputy

STATE OF TEXAS)
COUNTY OF TRAVIS)

I, Tom Blackwell, Judge of the 167th District Court do hereby certify that O. T. Martin, Jr., is the duly elected, qualified, and acting Clerk of this Court, that he is the custodian of the records of this Court, and that the attestation which he has attached to the foregoing records in Cause No. 174,116 before this Court is in due form according to the laws and practice of the State of Texas and this Court.

Signed and certified to this 31st day of March, 1970.

(Signature)
TOM BLACKWELL, *Judge*
167th Judicial District

NO. 174,116

IN THE DISTRICT COURT
OF TRAVIS COUNTY, TEXAS
167TH JUDICIAL DISTRICT

THE BOARD OF REGENTS OF THE
UNIVERSITY OF TEXAS SYSTEM

v.

NEW LEFT EDUCATION PROJECT,
RADICAL MEDIA PROJECT, PAUL SPENCER
and NANCY SWEENY, ET AL.

PLAINTIFF'S FIRST AMENDED ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Board of Regents of The University of Texas System, an agency of the State of Texas, and with leave of the Court files this Plaintiff's First Amended Original Petition for injunction, as Plaintiff, complaining of the New Left Education Project, a registered student organization at The University of Texas at Austin, and its President, Clyde Alan Locklear; the Radical Media Project, a registered student organization at The University of Texas at Austin, and its President, Gary Thiher; Paul Spencer, Nancy Sweeny, James Caldwell, Patricia Cuney, David Waddington, Larry Neil Winn, Stephen Wayne Russell, Judy Hart Smith, Linda Louise Smith, John Lane, Peter Kwant, Richard LeClaire, Bill Meecham, Doyle Nieman, Bride Murphy, Mike Hanson, Jeff Jones, Fred Hanson, and other persons of a class whose names are not immediately known to Plaintiff but whose activities are hereinafter more fully described, as Defendants, each of whom resides at this

time in Austin, Travis, County, Texas, insofar as the Plaintiff is able to ascertain.

I.

Plaintiff is the governing body of a state institution of higher education existing under and by virtue of the Constitution and statutes of the State of Texas and is governed by a Board of Regents, whose Chairman is Frank C. Erwin, Jr., of Austin, Travis County, Texas.

II.

That the Defendant, Clyde Alan Locklear, resides in Austin, Travis County, Texas, at 707½ West Lynn; that the Defendant, Gary Thiher, resides in Austin, Travis County, Texas, at 405 West 12th Street; that the Defendant, Paul Spencer, resides in Austin, Travis County, Texas, at 4301 East Avenue; that the Defendant, Nancy Sweeny, resides in Austin, Travis County, Texas, at 2323 San Antonio; that the Defendant, James Caldwell, resides in Austin, Travis County, Texas, at 1800 Rio Grande; that the Defendant, Patricia Cuney, resides in Austin, Travis County, Texas, at 909-B West 21st street; that the Defendant, David Waddington, resides in Austin, Travis County, Texas, at 2612 Guadalupe, Apartment 305; that the Defendant, Larry Neil Winn, resides in Austin, Travis County, Texas, at 3404 Grooms; that the Defendant, Stephen Wayne Russell, resides in Austin, Travis County, Texas, at 2200 Guadalupe; that the Defendant, Judy Hart Smith, resides in Austin, Travis County, Texas; at 3109 Owen Street; that the defendant, Linda Louise Smith, resides in Austin, Travis County, Texas, at 2307 Longview; that the remainder of the Defendants named above are residents of Austin, Travis County, Texas, at addresses that are presently unknown to

Plaintiff; that service of process may be had on the foregoing Defendants at the foregoing addresses.

III.

Plaintiff is the governing body of The University of Texas at Austin, an institution of higher education established pursuant to the laws of the State of Texas. The University of Texas at Austin has been operated as an institution of higher education at all times. The University of Texas at Austin, a component institution of The University of Texas System, is located in the City of Austin, Travis County, Texas, and is situated primarily between Guadalupe Street on the West, 27th Street on the North, Red River Street on the East, and 19th Street on the South. There are approximately 35,678 students presently attending The University of Texas at Austin. The University maintains dormitories, study halls, libraries, classrooms, and various other buildings and facilities for the primary and exclusive benefit of its students, as well as for the faculty and staff of the University. The University also engages in research projects and projects in experimentation and development.

IV.

That Defendants, and each of them, are selling and distributing for a valuable consideration or causing to be sold and distributed for a valuable consideration a newspaper known as "The Rag," and have from time to time sold and distributed or caused to be sold and distributed for a valuable consideration copies of "The Rag" on the campus of The University of Texas at Austin in violation of the rules and regulations of the Board of Regents of The University of Texas System. Plaintiff is also reliably informed and has reason to believe and does believe that "The Rag"

has been and will be sold and distributed or caused to be sold and distributed for a valuable consideration by these Defendants and others acting in concert with the Defendants.

V.

The Board of Regents of The University of Texas System has promulgated certain rules and regulations pertaining to commercial and noncommercial solicitations on the campus of any component institution of The University of Texas System, which said rules and regulations apply to the sale and distribution of newspapers and publications on the campus of any component institution of The University of Texas System, and such rules and regulations are set forth as follows:

Regents' Rules and Regulations, Chapter VI, Part One

6.11 Commercial solicitations will not be authorized on the campus of any component institution of The University of Texas System, except as otherwise provided in this section. Commercial solicitations include the sale, contract of sale, advertisement or promotion for sale, disposition of or contract to dispose of any item of personal property; the inducement of any person, group, or organization to contract with regard to any item of personal property, service, or anything that the offerer may offer; or the solicitation of funds or personal property. The following commercial solicitations are permissible:

(1) commercial solicitations in a Student Union Building that have been approved by the Board of Directors or by the appropriate union governing body subject to applicable institutional rules and regulations and applicable Regents' Rules and Regulations;

(2) the sale of any authorized student publication or any publication authorized by an agency of a component institution;

(3) any commercial solicitation made pursuant to a contract or agreement between the administration of a component institution and the vendor;

(4) the sale of any newspaper or other publication by means of a vending machine located in a campus building, if a certain area or areas within a campus building have been designated in advance by the institutional head or his representative as appropriate for such sales; and

(5) any commercial solicitation necessary for the normal administration, operation, and maintenance of any component institution as an educational institution.

6.12 No noncommercial solicitations, including fund raising for charity, shall be permitted on a campus of a component institution of The University of Texas System without the prior approval of the institutional head or his delegate.

6.121 Such approval by the institutional head may be granted for solicitation or fund raising for the needy or suffering, relief of the poor, or for public benevolent purposes, but it may not be granted for the personal benefit of an individual, group, or registered student organization, to pay for monetary indebtedness incurred by an individual, group, or registered student organization, or to pay any fee, fine, or other charge arising from a violation of federal, state, or local law.

6.122 Any noncommercial solicitation, including fund raising for charity, that is approved by the institutional head or his delegate shall be conducted in accordance with reasonable institutional regulations regarding time, place, procedure and financial reporting and accountability.

6.123 Notwithstanding the provisions of Section 6.121 above, with the approval of the institutional head or his delegate, a registered student organization may solicit or raise funds from its own members for the benefit of the organization but only at official meetings of the organization.

That prior to September 12, 1969, said rules and regulations pertaining to commercial and noncommercial solicitation on the campus of any component institution of The University of Texas System provided as follows:

Regents' Rules and Regulations, Chapter VI, Part One

6.11 Commercial solicitations will not be authorized on the campus of any component institution of The University of Texas System, unless prior approval has been granted by the institutional head or his representative. Commercial solicitations include the sale, contract of sale, advertisement or promotion for sale, disposition of or contract to dispose of any item of personal property; the inducement of any person, group, or organization to contract with regard to any item of personal property, service, or anything that the offerer may offer; or the solicitation of funds or personal property, except as otherwise provided in this section.

6.12 No noncommercial solicitations, including fund-raising for charity, shall be permitted on a campus of a component institution of The University of Texas System without the prior approval of the institutional head or his delegate.

6.121 Such approval by the institutional head may be granted for solicitation or fund-raising for the needy or suffering, relief of the poor, or for public benevolent purposes, but it may not be granted for the personal benefit of an individual, group, or registered student organization, to pay for monetary indebtedness incurred by an individual, group, or registered student organization, or to pay any fee, fine, or other charge arising from a violation of federal, state, or local law.

6.122 Any noncommercial solicitation, including fund-raising for charity, that is approved by the institutional head or his delegate shall be conducted in accordance with reasonable institutional regulations regarding time, place, procedure, and financial reporting and accountability.

6.123 Notwithstanding the provisions of Section 6.121 above, with the approval of the institutional head or his delegate, a registered student organization may solicit or raise funds from its own members for the benefit of the organization but only at official meetings of the organization.

VI.

In accordance with the rules and regulations set out in Paragraph V, the institutional head of The University of Texas at Austin has designated certain areas within campus buildings as available for the sale of newspapers and other publications by means of vending machines. The following areas have been designated:

(1) The vending room of the Texas Union (by virtue of action of the Board of Directors of the Texas Union, approved by the Board of Regents);

(2) The second floor foyer (crossover) between the office and classroom wings of the Business Administration-Economics Building;

(3) The entrance hall to the Law School snack bar (room 135) in Townes Hall; and

(4) The Jester Center Store.

Despite numerous requests from administrative officials of The University of Texas at Austin, the Defendants, their agents and representatives, and others acting in concert with Defendants, have refused to refrain from commercially soliciting the sale and distribution of copies of "The Rag" on the campus of The University of Texas at Austin and are in fact selling "The Rag" in areas of the campus other than those areas designated by the institutional head. Such sales and distribution have been and continue to be in direct violation of existing rules and regulations of The University of Texas System and The University of Texas at Austin, and the Defendants will continue

to sell and distribute, or cause to be sold and distributed as aforesaid, "The Rag" in violation of such rules and regulations unless restrained by this Court.

VII.

The Defendants and each of them have no vested legal right to sell and distribute "The Rag" in violation of the rules and regulations of The University of Texas System and The University of Texas at Austin, which activity, when conducted without permission, is adverse to the best interests of the students, staff, and faculty of The University of Texas System, and unless such activity is restrained, Defendants will do Plaintiff irreparable injury for which there is no adequate remedy at law.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that the Defendants and persons acting in concert with Defendants be temporarily restrained and enjoined from selling and distributing for consideration or otherwise the newspaper known as "The Rag" and from making any other commercial or noncommercial solicitation on the campus of The University of Texas at Austin except in compliance with the rules and regulations of The University of Texas at Austin and the Board of Regents of The University of Texas System, and be restrained and enjoined from doing any other act tending to interfere with the normal educational processes at such institution; that Defendants be cited to appear and answer this petition. That upon the hearing for temporary injunction, a temporary injunction be granted to continue in effect until final hearing on the merits; and that on final hearing the said injunction be made perpetual against all Defendants; and Plaintiff prays for such other and further relief and orders as the Court may deem proper.

CRAWFORD C. MARTIN
Attorney General of Texas

PAT BAILEY
Assistant Attorney General

(Signature)
W. O. SHULTZ
Assistant Attorney General
Capitol Station
Austin, Texas 78711

Attorneys for Plaintiff

STATE OF TEXAS)
COUNTY OF TRAVIS)

BEFORE ME, the undersigned authority, on this day personally appeared W. O. Shultz, who after being by me duly sworn did depose and say that he is an attorney of record for the Plaintiff and that he is authorized to make this affidavit and that the allegations contained in the Plaintiff's First Amended Original Petition are true and correct.

(Signature)
W. O. SHULTZ

SWORN TO AND SUBSCRIBED before me this 19th day of November, 1969.

(Signature)
KAY HAYNES
Notary Public in and for
Travis County, Texas

THE STATE OF TEXAS)
COUNTY OF TRAVIS)

I, O. T. MARTIN, JR., Clerk of the District Courts, within and for the State and County aforesaid, do hereby certify that the within and foregoing is a true and correct copy of PLAINTIFF'S FIRST AMENDED ORIGINAL PETITION in Cause No. 174,116, wherein The Board of Regents of the University of Texas System is Plaintiff, and New Left Education Project, Radical Media Project, Paul Spencer and Nancy Sweeny, et al. are Defendants, as the same appears on file and of record in this office.

Given under my hand and seal of office at Austin, Texas, this the 31st day of March, 1970.

O. T. MARTIN, JR.
Clerk, District Courts, Travis County, Texas

By-------- (Signed Cecelia Adair) --------
Deputy

STATE OF TEXAS)
COUNTY OF TRAVIS)

I, Tom Blackwell, Judge of the 167th District Court do hereby certify that O. T. Martin, Jr., is the duly elected, qualified, and acting Clerk of this Court, that he is the custodian of the records of this Court, and that the attestation which he has attached to the foregoing records in Cause No. 174,116 before this Court is in due form according to the laws and practice of the State of Texas and this Court.

Signed and certified to this 31st day of March, 1970.

(Signature)
TOM BLACKWELL, Judge
167th Judicial District

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL ACTION NO. A-69-CA-106

(Title omitted in printing)

DEFENDANT'S ANSWERS TO PLAINTIFFS' INTERROGATORIES

COMES NOW the Defendant in the above styled and numbered cause and by and through its attorney of record makes the following answers to Plaintiffs' interrogatories:

Interrogatory No. 1

1. Texas Ranger—a humor and feature magazine of college life, emphasizing life upon the campus of The University of Texas.

2. Riata—a literary magazine made up of contributions by students engaged in creative writing and art.

3. Student Directory—names, addresses and telephone numbers of the student body.

4. Daily Texan—the campus newspaper.

5. Cactus—the general campus yearbook.

6. Peregrinus—the law school yearbook.

7. Texas Engineering and Science Magazine—a magazine dealing with areas of current thought and research in the fields of science and engineering at The University of Texas.

8. Instructor Course Evaluation — a publication sponsored by the College of Arts and Sciences which was a report by various instructors on the relative

value of courses offered by this college. It is not currently published or sold.

9. Student Activities Handbook—a publication of the Student's Association containing general information about The University.

Interrogatory No. 2

1. Newspapers which have asked for and received permission to be sold in the designated manner and place.

A. Austin American
B. San Antonio Light
C. San Antonio Express
D. Houston Chronicle
E. Houston Post
F. Dallas Morning News
G. Dallas Times Herald
H. Fort Worth Star-Telegram
I. Wall Street Journal
J. Los Angeles Free Press
K. Christian Science Monitor
L. Rag (inside the Union)

2. Colleges and departments sell educational pamphlets, journals, and books dealing with educational subjects of the department. They are:

A. German Translation Journal
B. Arion—Classics department
C. Texas Quarterly—literature & arts
D. Graduate Journal
E. National Translation Center—publications of translations of scientific & artistic works
F. Texas Law Review
G. Social Sciences Quarterly
H. Texas Folklore Society
I. Humanities Research Publications
J. Art Library & Museum—catalogs concerning showings
K. Research and Development Center for Teacher Education—numerous manuals, etc.
L. Library—guides to micro-film, guides to manuscripts and other similar library assistance books
M. Registrar's Office—the Final Announcement of Courses and the Faculty and Staff Directory.

3. Football programs.

Interrogatory No. 3

1. Vending Machines — The University contracts with the Ex-Students Association who sub-contracts

with various vendors for the operation of cigarette, food, drink, laundry, and copying machines. The profits to The University of Texas are allocated by the Board of Regents of The University of Texas System and in the past have been used for student activities on the Austin campus.

2. Athletic Concessions—The athletic department contracts with the Ex-Students Association who subcontract with various vendors for the numerous items sold at athletic contests—food, drinks, penants, chair rental, etc. The profits from these operations go back into the athletic budget.

3. Music Department—A Capella Choral group sells stickers, records, cakes and other food items. The proceeds from these sales go to finance University authorized musical appearances.

4. Cinema 40—An activity of the Students Association. Movies are shown with an admission charge. If there are any profits they are used by the Students Association.

5. Life and hospitalization insurance—An activity of the Students Association which attempts to make available to the student the best insurance plan at a reasonable price. This is a service by the Association and they receive no proceeds from it.

6. Round-Up activities—Barbecues, dances, sweetheart presentations, etc. These are also activities of the Students Association with the proceeds helping to defray the cost of Round-Up.

7. University Film Committee—A University organization that shows older movies. An admission charge is not always charged but if one is, these monies go to pay for the rental charges on the film.

8. Athletic events—Admission charges for the various athletic events.

9. Educational events—Some departments such as as drama, music, German and French have film showings, plays, concerts and other events. The purpose of such events is to educate the student in the area involved.

Interrogatory No. 4

1. The vending room of the Texas Union (by virtue of action of the Board of Directors of the Texas Union, approved by the Board of Regents).

2. The second floor foyer (crossover) between the office and classroom wings of the Business Administration-Economics Building.

3. The entrance hall to the Law School snack bar (room 135) in Townes Hall.

4. The Jester Center Store and the Jester Center Mall.

5. The east wall of Varsity Cafeteria.

Interrogatory No. 5

The normal day to day operation of a university of this size requires numerous internal commercial transactions. These include:

1. Sales in the University Post Office of stamps and other postal items.

2. Sales by the University Stenographic Bureau of stationery and office supplies to departments and offices of The University.

3. Sales in the Jester Center store of toiletries and other items normally found in a drug store.

4. Sales in the Gregory Gym Store of athletic equipment.

5. Sales of food by the Division of Housing and Food Service.

6. Sales of printed material by the Printing Division and by the University Press.

7. Sales by the Extension Division of various educational material.

8. Sales by the Physical Plant Division of their services such as setting up chairs, building platforms, etc.

Interrogatory No. 6

1. Once a week a student organization of the Home Economics Department sells cookies and coffee to raise funds for departmental scholarships. This is done in the Home Economics building.

2. On January 21, 1970, the Community Involvement Committee of the Students Association sold balloons on the West Mall. The purpose was to raise funds for the poor and underprivileged people of East Austin.

3. On February 3, 1970, the Young Democrats solicited and obtained contributions for a breakfast program for the poor and needy. This was done on the West Mall.

4. On February 26, 1970, the Jester Women sponsored a game night and sold admission tickets. This was held in the Jester Center with the proceeds going to a recreational fund for Jester residents.

5. On February 24, 1970, the Middle East Studies Organization showed a film in Batts Auditorium to raise funds for Palestinian refugees.

6. During the January 1970, registration period all registered student organizations were allowed to solicit and raise funds for membership dues in the Gregory Gym area.

Interrogatory No. 7

See attached Exhibit "A."

Interrogatory No. 8

See attached Exhibit "B."

Interrogatory No. 9

See attached Exhibit "C.'

Interrogatory No. 10

The exhibit is accurate, however, "copies of record" are located at various places throughout the campus which have footnoted references to the Regents' Rules. See attached Exhibit "D."

CRAWFORD C. MARTIN
Attorney General of Texas

(Signature)
W. O. SHULTZ
Assistant Attorney General

PAT BAILEY
Assistant Attorney General
Capitol Station
Austin, Texas 78711

Attorneys for Defendant

(Jurat omited in printing)

(Certificate of Service omitted in printing)

Jan. 26-30, 1970	*"Booth Installation"*	*Location*
Current Issues Forum:	Membership enlistment	Near Gregory Gym
Austin Rugby Club:	" "	" "
Young Democrats:	" "	" "
Pre-Law Association:	" "	" "
Semper Fidelis	" "	" "
University Y:	" "	" "
U.T. Longhorn Archers:	" "	" "
Society of Individual Liberty:	" "	" "
Objectivism Study Group:	" "	" "
Ba'hai Association:	" "	" "
Student Mobilization Committee:	" "	" "
Gamma Delta Epsilon:	" "	" "
Intervarsity Christian Fellowship:	" "	" "
University Karate Club:	" "	" "
Alpha Phi Omega:	" "	" "
Young Socialist Alliance:	" "	" "
Young Americans for Freedom:	" "	" "
Worker Student Alliance Caucus:	" "	" "
University Circle K:	" "	" "
Campus Crusade for Christ:	" "	" "
Young Republicans:	" "	" "
Mexican Americans Student Org.:	" "	" "
Women's Liberation Front:	" "	" "
Campus Film Club:	" "	" "
Students Association:	Distribute insurance brochures	" "
Young Democrats, Feb. 2-6:	membership enlistment	West Mall
Campus Crusade, Feb. 2-16:	" "	" "
Texas Union Film Committee Feb. 9:	Advertise Union films	" "
Hamagshimim, Feb. 23:	membership enlistment	" "
Campus Crusade, Feb. 26-Mar. 12:	Distribution of literature	" "
Round-Up, March 23-27:	Advertise multi-media show	" "
Student Mobilization Com. Mr. 12, 13, 16-20:	Distribution of literature	" "
Youth International Party Mr. 9-22:	Stop the Draft Week	" "

EXHIBIT "A"

Organization	*Printed Matter*
Youth International Party	Yippie 'bust' book leaflet—what to do in case of arrest
Student Mobilization Committee	Advertise regional conference
Student Mobilization Committee	Advertise March Against the War on April 18
Young Socialist Alliance	Advertise speaker, "The Paris Commune" by Dave Prince
Intervarsity Christian Fellowship	Advertise drug program and speaker
Women's Liberation Front	Advertise program
University Y	Advertise moving of office & a party
Campus Crusade	Advertise soon rally on West Mall
Hamagshimim	Advertise speech "The New Left and Israel"
"	Advertise speaker, Kamal Monsour
"	Distribute message—Stop Air Piracy
"	Distribute message—Help meet threat to peace in Middle East
"	Distribute message—Jews in Arab Countries
"	Distribute message—Refugees in the Middle East
Campus Crusade	Distribute information concerning coming program
Hamagshimim	Distribute message—Arab propaganda campaign on campus
"	Near East report
"	American Jewish committee—Institute of Human Relations
"	Shaal at Carmiel
"	Dayan: Peace and some ideas for Afterwards
"	A letter to all Good People
"	Al Fatah: Resistance or Terror?
"	Of Peace in the Middle East
"	Israel and Equality
Intervarsity Christian Fellowship	What's your World View?
Women United	Support Welfare Mothers
Young Democrats	Speaker: Ralph Yarborough
Women's Liberation Front	Birth Control Information
Campus Crusade	A Jew Looks at the Resurrection—speaker

EXHIBIT "B"

Organization	*Printed Matter*
Student Mobilization Committee	Professor's Symposium
Petition to Reopen the Chuck Wagon	individual students
Students for a Democratic Society	same petition as above
U.T. Archery Club	Membership recruitment
Student Mobilization Committee	Antiwar conference
Young Democrats	Statewide Axe Erwin Drive
"	Campaigning tips
"	Advocate newspaper
Young Republicans	Battle of the Chuckwagon as it really was
	Monday: December 15, 1969—
Young Republicans	Two for Texas
SMC	National Student Antiwar Conference in Cleveland, Ohio
Young Socialist Alliance	Program for the Campus Revolt
"	Society of the Carnivorous Flower
"	Lenin: The Student Movement
University Y	Booksale
University Y	Get involved—programs
SDS	Away from Campus Parochialism
Chuckwagon Legal Aid Comm.	Put the state on Trial
Gamma Delta Epsilon	Programs
Objectivism Study Group	What is Objectivism?
Baha'i Association	You are invited to investigate
"	A Pattern for Future Society
"	One Universal Faith
Current Issues Forum	Above all Barriers
	Our program

EXHIBIT "B"

Organization	*Sign*	*Location*	*Date*
Cowboys	Advertise Round-Up Barbecue	West Mall	3-30 to 4-3
Women's Liberation	Meeting.	West Mall	3-16 to 3-19
Tolkien Society at U.T.	Meeting	West Mall & trees	2 weeks
Student Mobilization	Meeting	West Mall & trees	2 days
Alpha Epsilon Delta	Meeting	West Mall & trees	2 weeks
Charles Gremminger	Candidate platform (student)	West Mall	2 weeks
Texas Today & Tomorrow	Program	" & front of AC	1 week
Austin Rugby Club	Enlistment	West Mall	2 days
Pre-Law Association	Program	West Mall	2 days
Round-Up	Programs	West Mall	6 days
Radical Media Project	Programs	West Mall	2 weeks
University Y	Programs	West Mall	2 weeks
Gamma Delta	Program	Around Jester	4 days
Intercooperative Council	Program	West Mall	11 days
University Y	Program	West Mall	3 days
Women's Liberation	Program	" & trees	2 days
Intercooperative Council	Program	" & trees	2 weeks
University Surfing Assoc.	Program	trees	1 day
Citizens for Over Population Education	Program	trees	1 week
Lutheran Campus Ministry	Program	trees	6 days
Mexican American Student Organization	Program	trees	5 days
Student Mobilization	Program	trees	4 days
Intercooperative Council	Program	trees.	2 weeks
Committee for the Environmental Teach-In	Program	trees	2 weeks
Israeli Students Organization	Program	trees	1 week
Curtain Theatre	Program	trees	1 week
Women United	Program	trees	3 days
Womens Liberation	Program	trees	2 days
Fashion Group at UT	Program	trees	4 days
Society for Individual Liberty	Program	trees	3 days
Student International Meditation Society	Program	trees	1 week
Alpha Phi Alpha	Program	trees	3 days

EXHIBIT "C"

Organization	*Sign*	*Location*	*Date*
Texas Union	Program	trees	1½ weeks
Student International Mediation Society	Program	trees	1 week
American Institute of Aeronautic-Astronautics	Program	trees	4 days
Intervarsity Xian Fellowship	Program	trees	2 weeks
Students Assoc.	Program	trees	1 week
Young Republicans	Program	trees	3 days
Women United	Program	trees	2 days
American Institute of Chemical Engineers	Program	trees	5 days
Student Mobilization	Program	trees	2 weeks
American Society of Mechanical Engineers	Program	trees	5 days
University Surfing Association	Program	trees	1 day
Campus Crusade	Program	" & on booth	2 days
University Y	Program	trees	6 days
Women United	Program	trees	1 week
Pre-Law Association	Program	trees	4 days
Campus Film Club	Program	trees	2 weeks
Young Socialist Alliance	Program	trees	2 weeks
University Young Republicans	Program	trees	2 weeks
Mexican American Student Organization	Program	trees	2 weeks
Amateur Radio Club	Program	trees	2 weeks
Campus Crusade	Program	trees	2 weeks
Worker Student Caucus	Program	trees	1 week
Gamma Delta Epsilon	Program	trees	2 weeks
Student Mobilization	Program	trees	2 weeks
Austin Rugby Club	Program	trees	2 weeks
University Y	Program	trees	2 weeks
Interfraternity Council	Program	trees	2 weeks
Society for Individual Liberty Program	Program	trees	5 days
Texas Union Challenge	Program	Standards on W. Mall	2 weeks
Pre-Law Association	Program	trees	3 days
Young Democrats	Program	trees	4 days

EXHIBIT "C"

EXHIBIT "D"

Part V: General Information

SUBCHAPTER 10-300. STUDENT ADVOCACY[13]

Sec. 10-301. PETITIONS, HANDBILLS, AND LITERATURE

(a) After complying with Subsection (b), a student or an organization may publicly distribute on university property one or more petitions, handbills, or pieces of literature that are not obscene, vulgar, or libelous, or that do not advocate the deliberate violation of any federal, state, or local law, or that do not contain nonpermissible solicitation.[14]

(b) Before beginning distribution, the student or organization must deposit in the dean's office a copy of each petition, handbill, or piece of literature to be distributed. Each petition, handbill, or piece of literature deposited with the dean shall

(1) identify the student or organization distributing it; and

(2) if an organization is distributing it, contain the name and signature of the organization's adviser.

(c) No student or organization may distribute literature by accosting individuals or by hawking or shouting. A student or organization shall clean the area around which the literature was distributed.

Sec. 10-302. SIGNS

(a) In this chapter, unless the context requires a different meaning, "sign" includes billboard, decal, notice, placard, poster, banner, and any kind of hand-held sign.

(b) Except as provided in Section 10-303, a student or organization may publicly post a sign on university property. No object other than a sign may be posted on university property.

(c) Before publicly posting a sign, the student or organization must

(1) deposit in the dean's office a copy, photograph, or description of the sign to be posted;

(2) give notice to the dean on a form prescribed by the dean containing

(A) the name of the student or organization, and if an organization, the name of its adviser;

(B) the proposed general location for posting the sign;

(C) the length of time the sign will be posted; and

(D) the signature of the student, or if an organization, the signature of its representative and the signature of its adviser; and

(3) place the date of posting on each sign posted.

(d) A sign may not be

(1) attached to

(A) a shrub or plant;

(B) a tree, except by string to its trunk;

(C) a permanent sign installed for another purpose;

(D) a fence or chain or its supporting structure;

(E) a brick, concrete, or masonry structure; or

(F) statuary, a monument, or similar structure; or

(2) posted

(A) on or adjacent to a fire hydrant;

(B) on or between a curb and a sidewalk;

(C) on the East or South Mall; or

(D) in a university building, except on a bulletin board.

(e) A student or organization shall remove each of its signs not later than 14 days after posting or attaching or not later than 24 hours after the event to which it relates has ended, whichever is earlier. At the same time, the student or organization shall clean the area around which the sign was posted.

(f) No person may remove a sign posted or attached in accordance with this section by a student or organization without permission from the dean or the student or organization.

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[13]See *Regents' Rules*, Part I, Chapter VI, Section 1.4 and Section 3.8.

[14]See *Regents' Rules*, Part I, Chapter VI, Sections 6.11 and 6.12.

EXHIBIT "D"

Sec. 10-303. NONPERMISSIBLE SIGNS

(a) No student or organization may post or carry a sign that

(1) involves nonpermissible solicitation[16];

(2) identifies a person as a candidate for a specific local, state, or national political office;

(3) contains material that is obscene, vulgar, or libelous, or that advocates the deliberate violation of any federal, state, or local law; or

(4) is larger than 22 inches by 28 inches unless authorized under Subsection (b).

(b) The director of the physical plant upon application may permit a student or organization to post a sign not larger than 150-square feet in area.

Sec. 10-304. BULLETIN BOARDS

A bulletin board is under the jurisdiction of the college, school, department, or administrative office that maintains it. A student, group, or organization shall apply to the appropriate college, school, department, or administrative official for permission to use a bulletin board, and shall not use a bulletin board without such permission.

Sec. 10-305. BOOTHS

(a) In this chapter, unless the context requires a different meaning, "booth" includes furniture, enclosure, and any other structure temporarily installed for distributing petitions, handbills, or litarature, or for displaying signs, or for raising funds or soliciting tangible items.[16]

(b) A student or organization may install a booth after meeting the requirements of Subsections (c) and (d).

(c) Before installing a booth, a student or organization must apply to the dean for permission on a form prescribed by the dean. An application under this section shall contain

(1) the applicant's name, and if an organization, the name of its adviser;

(2) the proposed use of the booth;

(3) the proposed location and approximate size of the booth;

(4) the length of time that the booth will be installed; and

(5) the signature of the applicant or its representative, and if the applicant is an organization, the signature of its adviser.

(d) The dean shall approve an application properly made under Subsection (c) unless he has reasonable grounds to believe that

(1) the applicant is under a disciplinary penalty prohibiting installing a booth;

(2) the proposed location

(A) is unavailable;

(B) is in an area designated by the dean as inappropriate for a booth; or

(C) unreasonably obstructs pedestrian or vehicular traffic;

(3) the booth will be used for nonpermissible solicitation[17];

(4) the booth will be used for the distribution of material that is obscene, vulgar, or libelous, or that advocates the deliberate violation of any federal, state, or local law; or

(5) the booth will be installed for more than 14 calendar days.

(e) The student or organization that installs a booth shall remove it on or before the 1st class day after the day the permission to install expires. At the same time, the student or organization shall clean the area around the booth.

(f) No student or organization may operate a booth for the purpose of distributing, soliciting, or selling by accosting individuals or by hawking or shouting.

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[16]See *Regents' Rules*, Part I, Chapter VI, Sections 6.11 and 6.12.
[16]See *Regents' Rules*, Part I, Chapter VI, Section 6.12.
[17]See *Regents' Rules*, Part I, Chapter VI, Sections 6.11 and 6.12.

(g) If the dean refuses an application under Subsection (c), he shall give the applicant a written statement of the grounds for refusal.

Sec. 10-306. PUBLIC DEMONSTRATIONS AND ATHLETIC RALLIES

(a) Athletic rallies are under the jurisdiction of the Rally Advisory Committee.

(b) A student or organization may publicly assemble or demonstrate in a peaceful manner after obtaining the dean's permission.

(c) An application to publicly assemble or demonstrate shall be made on a form prescribed by the dean and shall contain

(1) the applicant's name, and if an organization, the name of its adviser;

(2) the proposed location, date, and time for the assembly or demonstration;

(3) the anticipated number of participants;

(4) the purpose of the assembly or demonstration; and

(5) the signature of the applicant or its representative, and if it is an organization, the signature of its adviser.

(d) The dean shall approve an application properly made under Subsection (c) unless he has reasonable grounds to believe that

(1) the applicant is under a disciplinary penalty prohibiting publicly assembling or demonstrating;

(2) the proposed location is unavailable at the time requested;

(3) the proposed date and time are unreasonable;

(4) the demonstration would unreasonably obstruct pedestrian or vehicular traffic;

(5) the assembly or demonstration would prevent, obstruct, or unreasonably interfere with the normal operations and activities of the university; or

(6) the assembly or demonstration would constitute an immediate and actual danger to the peace or security of the university that available law-enforcement officials could not control with reasonable effort.

(e) If an application under this section is refused, the dean shall give the applicant a written statement of the grounds for refusal.

SUBCHAPTER 10-400. PUBLIC PERFORMANCES

Sec. 10-401. SPONSORSHIP

(a) In this chapter, unless the context requires a different meaning, "public performance" means a public exhibition on university property for which admission will be charged.

(b) Only an organization may sponsor or present a public performance.

Sec. 10-402. APPLICATION

(a) Before an organization may advertise or present a public performance, it must apply to the dean for permission on a form prescribed by the dean. The application shall be combined with applications to reserve the use of a university facility under Subchapter 10-200 and for fund raising and noncommercial solicitation under Subchapter 10-500.

(b) An application under Subsection (a) shall contain

(1) the names of the organization and its adviser;

(2) A description of the proposed public performance;

(3) the approximate number of persons expected to attend the proposed performance;

(4) the proposed location, date, and time for the performance; and

(5) the signatures of a representative and the adviser of the organization.

(c) The dean shall approve an application properly made under Subsections (a) and (b) unless

(1) the request to reserve the use of a university facility is not approved under Section 10-203; or

(2) the proposed fund raising or other solicitation does not comply with Subchapter 10-500.

SUBCHAPTER 10-500. FUND RAISING AND SOLICITATION

Sec. 10-501. PERMISSIBLE FUND RAISING AND SOLICITATION[18]

(a) Commercial solicitations will not be authorized on the campus, except as otherwise provided in this section. Commercial solicitations include the sale, contract of sale, advertisement or promotion for sale, disposition of or contract to dispose of any item of personal property; the inducement of any person, group, or organization to contract to dispose of any item of personal property, service, or anything that the offerer may offer; or the solicitation of funds or personal property. The following commercial solicitations are permissible:

(1) commercial solicitations in the Texas Union Building that have been approved by the Board of Directors of the Texas Union, subject to applicable institutional rules and regulations and applicable Regents' Rules and Regulations;

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[18]See *Regents' Rules*, Part I, Chapter VI, Sections 6.11 and 6.12.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL ACTION NO. A-69-CA-106

(Title omitted in printing)

MOTION TO DISMISS

TO THE HONORABLE JUDGES OF SAID COURT:

COMES NOW the Defendant in the above entitled and numbered cause and moves the Court to dismiss the complaint of the Plaintiffs and in support of said motion respectfully shows the Court:

I.

That it affirmatively appears from Plaintiffs' Motion for Leave to Amend; First Amended Complaint; the Order entered by this Court on the 17th day of December, 1969; Motion for Leave to Intervene; and Order Granting Leave to Intervene entered on the 10th day of February, 1970, that Plaintiffs in this cause are all members of a class and fairly and adequately represent said class in this action, and, that all assert an action based upon common questions of law and fact which arise out of the same series of occurrences. That the common action asserted by Plaintiffs and on behalf of the class they represent is an assertion that Rules 6.11 and 6.12 of the Regents' Rules and Regulations, Chapter VI, Part One, as promulgated and as enforced deny to the Plaintiffs and the class they represent the freedoms and rights guaranteed and protected by the First and Fourteenth Amendments to the United States Constitution.

II.

That New Left Education Project, Clyde Alan Locklear, Nancy Sweeny, James Caldwell, Patricia Cuney, David Waddington, and Larry Neil Winn are Plaintiffs and members of the class of Plaintiffs in this cause and are also Defendants in Cause No. 174,116 in the 167th District Court of Travis County, Texas, wherein the Board of Regents of The University of Texas System is Plaintiff and the identity of the parties affirmatively appears from the pleadings in each cause. Certified and authenticated copies of Plaintiff's First Amended Original Petition, Defendants' First Amended Answer, and Judgment, in Cause No. 174,116 in the 167th District Court of Travis County, Texas, are attached to and made a part of movants' Second Amended Answer in this cause and the affidavit of W. O. Shultz filed in this cause.

III.

That it affirmatively appears from Defendants' First Amended Answer in Cause No. 174,116 in the 167th District Court of Travis County, Texas, that the Defendants specifically plead that Rules 6.11 and 6.12 of the Regents' Rules as promulgated and as enforced violated Defendants' freedoms and rights as guaranteed and protected by the First and Fourteenth Amendments to the United States Constitution. Plaintiffs in this cause are represented by the same attorney. That on the 25th day of February, 1970, there came on to be heard before the Court in the 167th District Court of Travis County, Texas, the Plaintiff's application for temporary injunction to enjoin Defendants in that cause and all others acting in concert with them from selling and distributing a newspaper as "The Rag" upon the campus of The University of Texas at Aus-

tin in violation of Regents' Rules 6.11 and 6.12. Both parties appeared by and through their respective attorneys of record. After direct and cross-examination of witnesses, introduction of evidence, oral argument and presentation of legal authorities upon the constitutional issues raised, the Court entered its Judgment finding that the Regents' Rules 6.11 and 6.12 as promulgated and as enforced did not violate the rights and freedoms of the Defendants as guaranteed and protected by the First and Fourteenth Amendments to the United States Constitution and enjoining Defendants and those acting in concert with them from selling or distributing "The Rag" or from making any other commercial or non-commercial solicitation upon the campus of The University of Texas at Austin except in conformity with the Regents' Rules.

IV.

That the Judgment in Cause No. 174,116 in the 167th District Court of Travis County, Texas, has not been appealed from and the time for perfecting an appeal has expired. That said Judgment is a final adjudication with regard to the constitutionality of Regents' Rules 6.11 and 6.12 with regard to the First and Fourteenth Amendments to the United States Constitution. That said Judgment is entitled to full faith and credit in this Court, and, under the doctrine of res judicata, the doctrine of estoppel and bar, and/or the doctrine of representation, said Judgment precludes the Defendants in that cause and all others who are members of the class of which they are representative from again litigating in this Court or any other court, the constitutionality of Regents' Rules 6.11 and 6.12 with regard to the First and Fourteenth Amendments to the United States Constitution upon the basis of an asserted action which admittedly arises out of the same series of

occurrences and involves the same questions of law and fact.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that this motion be granted and that judgment be entered dismissing the Plaintiffs' Complaint.

CRAWFORD C. MARTIN
Attorney General of Texas

(Signature)
W. O. SHULTZ
Assistant Attorney General

PAT BAILEY
Assistant Attorney General

Capitol Station
Austin, Texas 78711

Attorneys for Defendant

(Certificate of Service omitted in printing)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL ACTION NO. A-69-CA-106

(Title omitted in printing)

OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

COMES NOW the Defendant, Board of Regents of the University of Texas System and in opposition to the Plaintiffs' Motion for Summary Judgment would respectfully show the Court:

I.

That the pleadings and affidavits on file herein show that the issues raised by Plaintiffs and the members of the class that they represent have been decided adversely to said Plaintiffs in Cause No. 174,116 in the 167th District Court of Travis County, Texas, and the judgment in said cause has become final upon such issues.

II.

That in addition, the affidavits and answers to interrogatories show that there is a genuine issue of fact as to whether the Defendant has enforced the rules in question in a manner which favors other persons and organizations and discriminates against Plaintiffs and the class which they represent.

III.

That in addition, the affidavits and pleadings show that there is a genuine issue of fact as to whether unregulated solicitations upon the campus of the University of Texas at Austin would be disruptive to the academic and educational purposes to which such prop-

erty has been dedicated and offensive and annoying to students and personnel of the University.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that Plaintiffs' Motion for Summary Judgment be in all things denied and that Plaintiffs be required to prove the allegations of their complaint.

CRAWFORD C. MARTIN
Attorney General of Texas

(Signature)
W. O. SHULTZ
Assistant Attorney General

PAT BAILEY
Assistant Attorney General

Box R, Capitol Station
Austin, Texas 78711

Attorneys for Defendant

(Certificate of Service omitted in printing)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL ACTION NO. A-69-CA-106

(Title omitted in printing)

AFFIDAVIT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

My name is Frank C. Erwin, Jr., and I am presently residing at 2307 Woodlawn in Austin, Travis County, Texas. I am Chairman of the Board of Regents of The University of Texas System, over twenty-one years of age, of sound mind, and have never been convicted of a felony or a crime involving moral turpitude. I have knowledge of the facts stated herein and I am competent to testify to those matters.

The Board of Regents of The University of Texas System has adopted rules and regulations which govern commercial and noncommercial solicitations on all of the campuses of the component institutions comprising the system. Those rules and regulations are found in Subsections 6.11 and 6.12 of Chapter VI of Part One of the Regents' *Rules and Regulations*.

The object of those rules and regulations is to keep vendors, such as insurance salesmen, balloon salesmen, and other kinds of salesmen, as well as those persons soliciting funds, from coming on a campus where we have a highly-concentrated group of people. There are presently over 36,000 students and over 7,000 employees on the campus of The University of Texas at Austin, and these people function in a relatively small area where they are fair game for any kind of solicitor or salesman. The University does not want solicitors or salesmen, of whatever kind, coming onto a cam-

pus, walking up and down the walks, walking up and down the halls, and knocking on doors trying to solicit funds or sell their wares, thus interfering with the academic activities of the institution. The rules as they are presently drawn are simply a distillation of efforts over a period of years to draft rules that will prohibit that kind of solicitation and selling.

The people who are the most upset about the commercial solicitation rule are the people who are involved in the dissemination of "The Rag," an off-campus newspaper that has been sold on campus, but presently is under court order enjoining such sales. Those people are the only people who have refused to abide by the rule.

"The Rag" salesmen get out on walks and "hawk" their paper to passersby, which is exactly what the commercial solicitation rule is designed to prohibit; and in addition to that, I am advised that "The Rag" salesmen frequently use obscenities and other offensive language to those who pass by. I got complaints at my office through the telephone from people who were offended by the methods they were using. I cannot testify of my own knowledge that this was happening, but I can testify that I got the complaints.

But, regardless of this kind of language and the methods they were using, the people who disseminate "The Rag" were in violation of the rule, just as were the salesmen for "The Phoenix," which was a magazine that was started here in the spring of 1969. The position of "The Phoenix" people was that if "The Rag" people could sell their paper on campus, they were entitled to sell "The Phoenix" on campus; and that was a hard argument to answer, so we told them both to quit selling. "The Phoenix" quit and "The Rag" did not.

Subsection 6.11 of Chapter VI of Part One of the Regents' *Rules and Regulations* provides that "Commercial solicitations include the sale, contract of sale, advertisement or promotion for sale, disposition or contract to dispose of any item of personal property, service, or anything that the offerer may offer; or the solicitation of funds or personal property." And it lists five categories of commercial solicitations that are permissible.

The first category of permissible activity pertains to solicitations in a Student Union Building that have been approved by the Union Board of Directors or by the appropriate governing body. Each Student Union that I know of in the System has a student-faculty committee that governs the hour-to-hour, day-to-day operation of the Student Union. Of course, they are still subject to the control of the officers of the component institutions, the System officers, and the Board of Regents; but they do have an intermediate committee or board that has responsibility for the hour-to-hour, day-to-day operation of the Union.

The second category pertains to the sale of any authorized student publication or any publication authorized by an agency of a component institution. In Austin we have an agency called the Texas Student Publications, Inc., which is a nonprofit corporation. It is subject to the ultimate control of the Board of Regents but it is an agency of The University of Texas at Austin, which has the responsibility for the publication of official student publications such as "The Daily Texan," which is a newspaper; "The Cactus," which is the yearbook; "The Ranger," which is a humor magazine published sporadically; "Arion," which is a softbound publication of the Classics Department; and "The Texas Quarterly." Also included would be any

other publication authorized by a component institution and approved by the Board of Regents either through a separate resolution or through approval in the budget.

The third category pertains to any commercial solicitation made pursuant to a contract or agreement between the administration of a component institution and the vendor. That category contemplates our contracts, either directly or indirectly, with vending machine people who have all kinds of vending activities on the campus in which machines they sell soft drinks, food, milk, make change, etc., and pursuant to those contracts, they have these machines stationed in places where it is mutually agreeable. We have contracts with washing machine companies, either directly or indirectly, where they put clothes washing machines in certain dormitories. We also have contracts, directly or indirectly, with a company that furnishes food and drinks at the athletic contests.

The fourth category pertains to the sale on campus of any newspaper or other publication by means of a vending machine located in a campus building, if a certain area or certain areas within a campus building have been designated in advance by the institutional head or his representative as appropriate for such sales. The institutional head of The University of Texas at Austin has, I believe, designated four or five areas within specific campus buildings where such vending machine sales are authorized. Any newspaper, including "The Rag," may be sold from vending machines in the designated locations by applying to the appropriate administrative official.

The fifth category, which pertains to any commercial solicitation necessary for the normal administration, operation, and maintenance of any component institu-

tion as an educational institution, applies principally to the sale to students by the University of textbooks, workbooks, laboratory equipment, school supplies, and other articles needed or consumed in the usual course of academic work. It would also apply to items sold by the University on the campus for the convenience of the students, such as toiletries and personal items sold in a University dormitory.

The rationale of all of the five named exceptions to the rule is that these excepted activities are of sufficient importance and service to the students and faculty that they should be permitted.

(Signature)
FRANK C. ERWIN, JR.

(Jurat omitted in printing)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL ACTION NO. A-69-CA-106

(Title omitted in printing)

AFFIDAVIT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

My name is Jack Holland. I am over twenty-one years of age and of sound mind. I have never been convicted of a felony or of a crime involving moral turpitude and I have personal knowledge of the facts stated herein and am competent to testify to such matters.

I am presently employed by The University of Texas at Austin as Assistant Vice-Chancellor for Student Affairs. I have previously been employed as Assistant Dean of Men, Dean of Men, and Dean of Students at The University of Texas at Austin.

I have received complaints from employees, faculty and students who had been approached on the campus by persons selling magazines, newspapers, encyclopedia or insurance, and were annoyed by these salesmen. In response to the complaints I went to these salesmen and informed them that they were violating University rules and asked them to leave the campus.

(Signature)
JACK HOLLAND

(Jurat omitted in printing)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL ACTION NO. A-69-CA-106

(Title omitted in printing)

AFFIDAVIT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

My name is Edwin B. Price. I am over twenty-one years of age and of sound mind. I have never been convicted of a felony or of a crime involving moral turpitude and I have personal knowledge of the facts stated herein and am competent to testify to such matters.

I am presently employed by the University of Texas at Austin as a lecturer in Physical and Health Education and as an Assistant Dean of Students. On behalf of the Dean of Students I supervise the administration and enforcement of Regents' Rules 6.11 and 6.12 relating to solicitations upon the campus.

I have received reports from laboratory instructors that persons soliciting the sale of newspapers and magazines in the laboratories and laboratory buildings were disruptive and distracting to the conduct of the laboratory courses. I have also received reports that newspaper and magazine salesmen were annoying residents of dormitories located on the campus of the University of Texas at Austin.

Complaints have been received from professors concerning circulars and pamphlets soliciting magazine subscriptions that have been placed on each desk in their classrooms prior to beginning of class. These circulars and pamphlets disrupted the class in that the

students were reading the circulars and pamphlets rather than being attentive to the professor.

My duties also include the registration of student organizations. There were approximately 450 student organizations registered with the office of the Dean of Students during the 1970 spring semester. These organizations were allowed to solicit membership during the registration period for the 1970 spring semester in accordance with Regents' Rules 6.124.

The malls of The University of Texas at Austin have not been maintained or used as traditional free speech areas. The patio area immediately adjacent to the student union building is maintained as a free speech area for public discussion and demonstration without prior permission.

(Signature)
EDWIN B. PRICE

(Jurat omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL ACTION NO. A-69-CA-106

(Title omitted in printing)

STIPULATION

Come now the parties by and through their respective attorneys of record and stipulate and agree that the following matters are true and correct and may be considered as established and proven by competent evidence for the purposes of further hearing in this cause:

1.

Typically there are three or four booths erected along the West Mall of the campus of the University of Texas at Austin distributing literature, sometimes there are as many as fifteen such booths and sometimes none. Such booths are also permitted on the Main Mall of the campus. These booths are maintained in conformity with existing University rules.

2.

The "Daily Texan" is regularly distributed on the campus of the University of Texas at Austin from various fixed locations, to wit: the Art Building, the Business and Economics Building, the Engineering and Science Building, Experimental Science Building, the Journalism Building, the Main Building, the Music Building, Taylor Hall, Townes Hall, the Union Building and the Pharmacy Building, this distribution is made from stands maintained at the entrances to the respective buildings either inside or outside the doors. The "Daily Texan" customarily carries com-

mercial advertising of various types, the issue of the "Daily Texan" attached hereto is typical.

3.

In the past, the "Texas Ranger," a student publication, has been sold for one day, seven times a year, from booths at the following locations:

1 booth — West Mall
1 booth — South Mall
1 booth — West side of Business and Economics Building
1 booth — 24th and Whitis
1 booth — Townes Hall
1 booth — Engineering Science Lab

Beginning with the fall semester 1970, the "Texas Ranger" will no longer be sold from booths at the foregoing locations, but will become a monthly insert in the "Daily Texan."

4.

"The Riata," a student publication, is sold upon the campus twice a year, for one day from booths at the following locations:

1 booth — West Mall
1 booth — South Mall
1 booth — West side of Business and Economics Building
1 booth — 24th and Whitis

5.

Once a year the "Student Directory," a student publication, is sold from booths at the same locations as "The Riata."

6.

The educational pamphlets, journals, and books sold

by the colleges and departments and listed in defendant's answer to plaintiffs' Interrogatory No. 2, are not sold from booths upon the malls of the campus, but are sold either through subscriptions or at the office of the particular college or department.

7.

The Young Socialist Alliance has never sought permission to sell its political pamphlets and literature from vending machines as permitted by Regents' Rule 6.11.

8.

As the existing Rules 6.11 and 6.12 now provide (attached) the Young Democrats are permitted to solicit membership dues during registration periods and at official meetings of the organization. They may not solicit dues on campus at other times and locations and may not solicit dues from booths maintained by the organization on the campus on the West Mall or Main Mall.

9.

There is a "free speech area" of approximately 17,000 square feet located and maintained on the campus of the University of Texas at Austin adjacent to the East side of the Student Union, in this area speech and demonstration of all kinds is permitted without prior administration approval, solicitation of funds and sale of literature is not permitted in this area. Attached is a schematic diagram of the campus of the University of Texas at Austin reflecting the location of various buildings. The Austin campus covers approximately 262 acres, and the present enrollment of the University or Texas at Austin is over 36,000 students and there are over 7,000 employees.

For purposes of this hearing Plaintiffs do not contend that Defendants have discriminatorily enforced the rules in question, but do contend, among other things, that the rules themselves are discriminatory in application.

Signed this 24th day of June, 1970.

(Signature)
DAVID R. RICHARDS
308 West 11th Street
Austin, Texas

Attorney for Plaintiffs

CRAWFORD C. MARTIN
Attorney General of Texas

(Signature)
W. O. SHULTZ
Assistant Attorney General
Box R, Capitol Station
Austin, Texas 78711

Attorneys for Defendant

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL ACTION NUMBER A-69-CA-106

NEW LEFT EDUCATION PROJECT, YOUNG DEMOCRATIC CLUB AT THE UNIVERSITY OF TEXAS AT AUSTIN, YOUNG SOCIALIST ALLIANCE, CLYDE ALAN LOCKLEAR, NANCY SWEENY, JAMES CALDWELL, PATRICIA CUNEY, DAVID WADDINGTON, LARRY NEIL WINN, EMMA LEIGH WASHBURN, JANIS BUCHANAN, CARL ROBERTS, JAMES R. WEDDINGTON, SETH B. COX, EMILY CALHOUN, RICHARD STREETER, MARILYN TURBOFF, PAULA BEAIRD, ROBERT KLAYMAN, LYSSA KLAYMAN AND BARBARA HINES

vs.

BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM

MEMORANDUM OPINION

BEFORE: JUDGE HOMER THORNBERRY, Circuit Judge, JUDGE D. W. SUTTLE and JUDGE JACK ROBERTS, District Judges.

PER CURIAM

This suit was born of a state court proceeding instituted by the University of Texas Board of Regents against the New Left Education Project and a number of individuals, seeking to restrain them from violating two Regents' rules by distributing a newspaper known as the *Rag* on the Austin campus of the University of Texas. The defendants in that suit filed this case requesting that this Court enjoin the further prosecution

of the state court suit, and declare the Regents' rules which found the basis of that suit unconstitutional.

This Court met in November, 1969, and decided this case was properly one to be heard by a three-judge court convened under 28 U.S.C. §2281 (1964). The Court also allowed joinder as parties plaintiff the Young Democratic Club at the University of Texas at Austin, and a number of individual University of Texas students interested in the "free flow of ideas" and the "full enjoyment of First Amendment rights" on the University of Texas campus. At the same time, the Court refused the original plaintiffs declaratory and injunctive relief and dismissed them as plaintiffs so that there would be no interference with the state judge's adjudication of the proceedings pending against them in state court. The remaining plaintiffs, however, were allowed to challenge the two rules "in further proceedings" in the Court. The Young Socialist Alliance of the University of Texas was subsequently also allowed to intervene as a party plaintiff. The case is now before us on the plaintiffs' motion for summary judgment and the defendants' motion to dismiss.

I.

The defendants argue that this suit should be dismissed because the state court judgment rendered in the suit against the severed plaintiffs in this case is res judicata on the question of the constitutionality of the two Regents' rules challenged here. The state court has determined that the two rules "are not in violation of the First and Fourteenth Amendments," and has granted a temporary injunction against the New Left Education Project, individuals associated with the publication and distribution of the *Rag*, and all persons acting in concert with them, restraining them from

"selling or distributing the newspaper known as the *Rag* upon the campus of The University of Texas at Austin. . ." and from engaging in any other violation of the commercial and non-commercial solicitation rules involved in this case.

Assuming *arguendo* that this Court's earlier decision to allow joinder of parties plaintiff under Federal Rule 20(a) was, as the Regents argue, in fact a determination that all the parties in federal court constituted a class under Federal Rule 23, it still does not follow that the state court injunction issued against some of the federal class members will support res judicata as to the remainder of the class. In the first place, there is no final judgment in the state court. Under Texas law, a temporary injunction "[can] not be the basis of res judicata since it is only an interlocutory order. . ." *Miers vs. Brouse,* 153 Tex. 54, ——, 271 S.W.2d 419, 421 (1954). Thus there is no full-faith-and-credit issue presented in this case which might justify a holding of res judicata. *Compare Gart vs. Cole,* 263 F.2d 244 (2d Cir. 1959).

Secondly, the state court proceeding never purported to deal with a "class" any larger than individuals associated with the publication and distribution of the *Rag.* The remaining plaintiffs in the larger "class" in the federal lawsuit were never in state court, and are certainly not bound by even the most expansive reading of that court's injunction.

In the final analysis the Regent's res judicata argument amounts to no more than a reliance on *England* vs. *Board of Medical Examiners,* 375 U.S. 411 (1964) for the proposition that in this case the entire federal "class" voluntarily chose to fully litigate its constitutional claims as a class in state court. This assertion is unspportable. On the basis of a "technical" rule—the

anti-injunction statute, 28 U.S.C. §2283 (1964)—and the policy of federal-state comity, this Court earlier temporarily denied some of the plaintiffs the right to litigate their federal claims in federal court. The Regents' suggestion that this Court's respect for the policy of comity entitles them to a judgment of res judicata flies in the face of the strong policy in favor of respecting a Plaintiff's choice of a federal forum for litigating his federal claims. As the Court in *England* stated, "[t]he right of a party plaintiff to choose a Federal Court where there is a choice cannot be properly denied," 375 U.S. at 413, *quoting Willcox* vs. *Consolidated Gas Co.*, 212 U.S. 19, 40 (1909).

Even if the *Rag* plaintiffs could be said to have defended the state court suit in such a way as to have voluntarily forgone their right to return to this Court, the remaining plaintiffs, having never even been in state court, can hardly be held to have relinquished their right to return, especially since this Courts' earlier order left those plaintiffs in this Court for "further proceedings" in their case.

Defendants' motion to dismiss is accordingly denied. Since there are no material facts at issue, we find this case ripe for determination on the plaintiffs' motion for summary judgment.

II.

The Regent's Rules at issue prohibit both "commercial'" and "non-commercial'" solicitation on the campus of any component institution of the University of Texas System. "Commercial" solicitation is broadly defined to include not only the sale or contract for sale of any item of personal property, but also the "inducement of any person . . . to contract with regard to . . . anything the offeror may offer." Commercial solici-

tation is prohibited except for five permissible categories: (1) solicitation inside a Student Union Building that has been approved by the governing body of the Union; (2) the sale of any publication authorized by an agency of the component institution; (3) solicitation pursuant to a contract between the vendor and the governing authority of a campus; (4) the sale of publications from vending machines at approved location; and (5) any solicitation necessary for the educational purposes of the University.' Non-commercial solicitation is not defined in Rule 6.12. Nonetheless, such solicitation is prohibited without the prior approval of the component institution head or his delegate. Approval may be granted for "public benevolent purposes," but not for fund-raising for the benefit of a particular person or group. However the institution head of a campus may approve the solicitation of funds by registered student organizations from their members, but only "at official meetings of the organization.'" The Plaintiffs argue that both rules violate their first amendment rights of speech and association because they are overly broad and are mere licensing schemes. As these rules are currently applied, neither the Young Democrats nor the Young Socialist Alliance can solicit dues from potential members of their organization on campus without permission of the institutional head, and then only at official meetings.' Moreover, neither group can sell political material, such as tracts by Leon Trotsky or even campaign bumper stickers, on the main malls of the Austin campus. It is undisputed that these rules seriously impede the associational activities of the organizations, primarily because the rules decrease their ability to procure both members and funds. It is also undisputed that a great deal of commercial and non-commercial solicitation coming within the heretofore noted excep-

tions to the rules is allowed on the Austin campus. It is not clear, however, which of the two rules questioned prohibit the activities engaged in by the plaintiffs. For example, solicitation of dues from new members by either organization is purportedly covered by the terms of the non-commercial solicitation rule, which prohibits such solicitation without approval of the institutional head, and then only at official meetings of the organization. Thus solicitation of dues on campus would violate the non-commercial rule. But it seems clear that such solicitation would also constitute "the solicitation of funds" within the meaning of the commercial solicitation rule. Indeed, under the commercial rule, soliciting a person to become a dues-paying member of an organization would constitute a violation of that portion of the rule which prohibits the "inducement of any person . . . to contract with regard to . . . anything that the offeror may offer"—namely, membership in the organization. Moreover, some of the activities at issue—selling books, pamphlets, newspapers and campaign paraphanalea (sic) for fund-raising purposes—are clearly covered by the prohibition against the commercial sale of personal property. The sale of a newspaper like the Young Socialists' *The Militant*, if not for profit, might be either commercial or non-commercial. It seems significant that in the state injunction suit the Regents claimed that the activities of the *Rag* (a supposedly non-profit organ of the New Left Education Project) violated both rules. Although the rules are not challenged on the grounds of vagueness there is enough ambiguity in their coverage to warrant this Court's considering the rules together for purposes of the overbreadth question raised by the plaintiffs.

III.

We start from the dual premises that soliciting dues-

paying members for a lawful organization—especially a political one—is speech and associational activity of a fairly high order, see *N.A.A.C.P. vs. Alabama,* 357 U.S. 449 (1958); *Schneider vs. State,* 308 U.S. 147 (1939), as is distributing literature which "communicate[s] thoughts between citizens, and discuss[es] public questions," *Hagne* (sic) *vs. C.I.O.,* 307 U.S. 496, 515 (1959)—especially when its content is primarily political. Such literature is no less protected by virtue of the fact that it is sold, whether with or without the realization of an actual profit. *Ginzburg vs. United States,* 383 U.S. 463, 474 (1966). *New York Times vs. Sullivan,* 376 U.S. 254, 266 (1964).

While it is often said that first amendment rights are not absolute, and that conduct incidental to the exercise of speech in public places is subject to reasonable nondiscriminatory regulation governing time, manner, and place, *Cantwell vs. Connecticut,* 310 U.S. 296 (1939), it is well-settled law that once it is determined that state action impinges on high-order first amendment rights—which these rules undoubtedly do—then the burden of proof is on the state to show that the governmental interests asserted to support the impingement are "compelling." *N.A.A.C.P. vs. Alabama,* 357 U.S. 449 (1958); *Sweezy vs. New Hampshire,* 354 U.S. 234, 265 (Frankfurter, J., concurring) (1957). Absent such a showing, any "time," "manner," or "place" regulation is unreasonable. An educational institution's interest in preventing substantial disorder or material disruption of classroom activity is, of course, such a "compelling" state interest, which justifies some reasonable regulation. *Tinker vs. Des Moines Community School District,* 393 U.S. 503, 513 (1969). Not surprisingly, the Regents assert that preventing such disruption is precisely the purpose of the

rules.[8] From this premise, however, it does not follow that any rule the Regents might pass is impervious to constitutional attack. For it is quite clear that even "[l]egtimate legislative goals cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Elfbrandt vs. Russell,* 384 U.S. 11, 18 (1966). This "less restrictive means" principle is especially applicable to regulations that impinge on first amendment speech and associational rights, even when accompanied by conduct. *Talley v. California,* 362 U.S. 60 (1960); *Schneider v. State,* 308 U.S. 147 (1939); *see Hiett v. United States,* 415 F.2d 664 (5th Cir. 1969), cert. denied 397 U.S. 936 (1970).

Thus, while the Regents can certainly prohibit disruptive or fraudulent solicitation, they must do so in a manner that strikes at the very evil they wish to prevent. Applying this principle to the case at hand, we find that the Regents' solicitation rules at issue are unconstitutionally overbroad.

The severe limitations the rules place on solicitation generally are unreasonably restrictive of the clearly protected activities engaged in by the plaintiffs in this case. Thus by broadly limiting all solicitation in the two rules, the Regents have simply failed to speak with that small calibre precision required of regulations touching first amendment rights.

This holding in no way impairs the right of the Regents to prohibit activity disruptive of the educational processes on campus. There have been complaints that magazine salesmen have disrupted classes by passing out subscription forms during class meetings. Such activity is clearly prohibitable by a non-discriminatory rule forbidding classroom disruption. Similarly, to the

extent that campus congestion is a problem created by setting up solicitation booths, the Regents could formulate a reasonable, non-discriminatory rule limiting the number of such booths allowed on campus at any one time. If litter is a concern, an anti-litter rule would be appropriate. Perhaps most importantly for purposes of achieving the primary stated objective of the present rules, a much narrower and constitutionally permissible rule could undoubtedly be devised that would severely limit "purely commercial" solicitation on campus, see *Valentine v. Chrestensen*, 316 U.S. 52 (1942). But cf. *Grazburg v. United States*, 383 U.S. 463, 474 n. 17 (1966); *New York Times v. Sullivan*, 376 U.S. 254, 266 (1964); *Hiett v. United States, supra.*

IV.

The constitutional vice of the present Regents' rules governing solicitation extends beyond their overbreadth. They are also invalid as licensing regulations that do not set out adequate guidelines for the exercise of the licensing authority's power to grant or deny permission to exercise first amendment rights. Despite the commercial solicitation rules' broad prohibition of the sale of publications on campus outside of certain areas, any publication can be sold on campus if it has been "authorized by an agency of a component institution." There are no standard governing the issuance of such authorization. There is a similar provision in the noncommercial solicitation rule, which permits such solicitation if the institutional head finds that the fund-raising is for "the needy or suffering, relief of the poor or for public benevolent purposes." As the plaintiffs point out, we are left to surmise what causes constitute "public benevolent purposes," as are the institutional heads who are charged with the administration of this regulation. Thus these regulations vest

standardless discretion in the institutional head or his agency-delegate to grant or withhold exercise of first amendment rights. It is well settled law that regulations cannot be allowed to stand when they make enjoyment of first amendment freedoms contingent upon the will of an administration. See *Staub v. City of Baxley,* 355 U.S. 313 (1958); *Largent v. Texas,* 318 U.S. 418 (1943); *Schneider v. State,* 308 U.S. 147 (1939); *Lovell v. City of Griffin,* 303 U.S. 444 (1938).

It is therefore ADJUDGED that Sections 6.11 and 6.12 of the Regents Rules and Regulations are unconstitutional; it is further ORDERED that the Regents are hereby ENJOINED from enforcing either section.

Counsel for the plaintiffs will submit an appropriate form of Judgment within ten (10) days from date of the filing of this Memorandum Opinion.

Signed at Austin, Texas, this 3rd day of September, 1970.

(Signature)
JUDGE HOMER THORNBERRY

(Signature)
JUDGE D. W. SUTTLE

(Signature)
JUDGE JACK ROBERTS

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[1]They have not sought to return, so this Court does not need to decide the issue.

[2]University of Texas Board of Regents, Rules and Regulations, Ch. VI, pt. 1, §6.11.

[3]University of Texas Board of Regents, Rules and Regulations, Ch. VI, pt. 1, §6.12.

[4]*'Regents' Rules and Regulations, Chapter VI, Part One*
6.11 Commercial solicitations will not be authorized on the campus of any component institution of the University of Texas System, except as otherwise provided

in this section. Commercial solicitations include the sale, disposition of or contract to dispose of any item of personal property; the inducement of any person, group, or organization to contract with regard to any item of personal property, service, or anything that the offerer may offer; or the solicitation of funds or personal property. The following commercial solicitations are permissible:

(1) commercial solicitations in a Student Union Building that have been approved by the Board of Directors or by the appropriate union governing body subject to applicable institutional rules and regulations and applicable Regents' Rules and Regulations;

(2) the sale of any authorized student publication or any publication authorized by an agency of a component institution;

(3) any commercial solicitation made pursuant to a contract or agreement between the administration of a component institution and the vendor;

(4) the sale of any newspaper or other publication by means of a vending machine located in a campus building, if a certain area or areas within a campus building have been designated in advance by the institutional head or his representatives as appropriate for such sales; and

(5) any commercial solicitation necessary for the normal administration, operation, and maintenance of any component institution as an educational institution.

[5]*Regents' Rules and Regulations, Chapter VI, Part one*

6.12 No noncommercial solicitations, including fund raising for charity, shall be permitted on a campus of a component institution of The University of Texas System without the prior approval of the institutional head or his delegate.

6.121 Such approval by the institutional head may be granted for solicitation or fund raising for the needy or suffering, relief of the poor, or for public benevolent purposes, but it may not be granted for the personal benefit of any individual, group, or registered student organization, to pay any fee, fine, or other charge arising from a violation of federal, state, or local law.

6.122 Any noncommercial solicitation, including fund raising for charity, that is approved by the institutional head or his delegate shall be conducted in accordance with reasonable institutional regulations regarding time, place, procedure and financial reporting and accountability.

> 6.123. Notwithstanding the provisions of Section 6.121 above, with the approval of the institutional head or his delegate, a registered student organization may solicit or raise funds from its own members for the benefit of the organization but only at official meetings of the organization.

"The facts also establish that campus organizations are allowed to solicit dues and members during registration week at the beginning of each semester. The authority for this *de facto* exception to the facially all-inclusive rule against non-commercial solicitation, which purports to cover dues solicitation, is unclear.

"For example, various student publications, including the Texas Ranger, the Daily Texan, the Texas Quarterly, and the Texas Law Review, are sold on campus, and the Student Association sells life and hospitalization insurance, all under exceptions to the commercial solicitation rule. Examples of non-commercial solicitation permitted on campus are sales of balloons to solicit funds for the needy, sales of cakes and cookies for home economics departmental scholarships, and maintenance of a booth on campus for membership enlistment and literature distribution by the Campus Crusade for Christ.

"The Chairman of the Board of Regents asserts that the object of the rules is to "keep vendors, such as insurance salesman, balloon salesman, and other kinds of salesmen, as well as those persons soliciting funds from coming on the campus where we have a highly concentrated group of people." Further, the University "does" not want solicitors or salesmen, of whatever kind, coming onto campus, walking up and down the halls, and knocking on doors trying to sell their wares, thus interfering with the academic activities of the institution."

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL ACTION NUMBER A-69-CA-106

NEW LEFT EDUCATION PROJECT, YOUNG DEMOCRATIC CLUB AT THE UNIVERSITY OF TEXAS AT AUSTIN, YOUNG SOCIALIST ALLIANCE, CLYDE ALAN LOCKLEAR, NANCY SWEENY, JAMES CALDWELL, PATRICIA CUNEY, DAVID WADDINGTON, LARRY NEIL WINN, EMMA LEIGH WASHBURN, JANIS BUCHANAN, CARL ROBERTS, JAMES R. WEDDINGTON, SETH B. COX, EMILY CALHOUN, RICHARD STREETER, MARILYN TURBOFF, PAULA BEAIRD, ROBERT KLAYMAN, LYSSA KLAYMAN AND BARBARA HINES

vs.

BOARD OF REGENTS OF THE
UNIVERSITY OF TEXAS SYSTEM

JUDGMENT

On the 26th day of June, 1970, the above cause came on to be heard on Plaintiffs' Motion for Summary Judgment before a three-judge court comprised of United States Circuit Judge Homer Thornberry, United States District Judge Jack Roberts, and United States District Judge D. W. Suttle, and the Court having considered all of the evidence, stipulations of the parties, and briefs and argument of counsel, in accordance with the Court's opinion heretofore filed on September 3rd, 1970, ORDERS, ADJUDGES and DECREES as follows:

1.

There being no material facts at issue, this matter

is ripe for determination on Plaintiffs' Motion for Summary Judgment.

2.

Pursuant to the provisions of 28 U.S.C., Section 2201, the Court declares that the activities engaged in by the Plaintiffs on the University of Texas campus in solicitation of membership dues and/or sale of literature constitutes speech and associational activities protected by the First Amendment to the United States Constitution, and inasmuch as Regents' Rules and Regulations unreasonably interfere with these constitutional rights, Sections 6.11 and 6.12 of the Regents' Rules and Regulations are hereby declared to be unconstitutional and unenforceable.

3.

Pursuant to the provisions of Rule 65 of the Federal Rules of Civil Procedure the Court permanently enjoins Defendant Board of Regents of the University of Texas System, and all of the Defendant's agents, servants, employees and attorneys and all other persons in active concert or participation with them from further enforcement against the Plaintiffs of Article 6.11 and Article 6.12 of the Rules and Regulations of the Board of Regents of the University of Texas System.

Signed and entered this 9th day of September, 1970.

(Signature)
JACK ROBERTS, Judge
United States District Court
for the Western District of Texas

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL ACTION NO. A-69-CA-106

(Title omitted in printing)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Defendant Board of Regents of the University of Texas System in the above entitled and numbered cause hereby appeals to the Supreme Court of the United States from the judgment entered in this cause on the 9th day of September, 1970. This appeal is taken pursuant to 28 U.S.C. §1253.

CRAWFORD C. MARTIN
Attorney General of Texas

(Signature)
W. O. SHULTZ II
Assistant Attorney General

(Signature)
JAMES C. MCCOY
Assistant Attorney General

P. O. Box 12548
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Attorneys for Defendant

(Certificate of Service omitted in printing)

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL ACTION NO. A-69-CA-106

(Title omitted in printing)

REQUEST TO CERTIFY RECORD AND TRANSMIT RECORD TO SUPREME COURT OF THE UNITED STATES

NOW COMES the Board of Regents of the University of Texas System, and in conformity with Rule 12 of the Supreme Court of the United States, hereby requests the Clerk of the United States District Court for the Western District of Texas, Austin Division, to certify the record in the above captioned and numbered cause, and, to transmit said certified record to the Clerk of the Supreme Court of the United States within such time as to permit it to be filed in said Court within sixty days from the filing of the notice of appeal of these parties.

CRAWFORD C. MARTIN
Attorney General of Texas

(Signature)
W. O. SHULTZ II
Assistant Attorney General

(Signature)
JAMES C. McCOY
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P. O. Box 12548
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(Certificate of Service omitted in printing)

70-55

Supreme Court, U.S.
FILED
DEC 14 1970
E. ROBERT SEAVER, CLERK

NO. [redacted]

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

* * * *

BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM,

Appellant

v.

NEW LEFT EDUCATION PROJECT, ET AL.,

Appellees

* * * *

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

* * * *

JURISDICTIONAL STATEMENT

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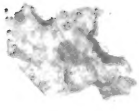

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NO.----------

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

* * * *

BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM,

Appellant

v.

NEW LEFT EDUCATION PROJECT, ET AL.,

Appellees

* * * *

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

* * * *

JURISDICTIONAL STATEMENT

The Appellant appeals from that portion of the judgment of the United States District Court for the Western District of Texas, Austin Division, entered on September 9, 1970, declaring Section 6.11 of Part I of Chapter VI of the Rules and Regulations of the Board of Regents of the University of Texas System to be unconstitutional and permanently enjoining the Appellant from enforcing such rule. Appellant submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the United States District Court for the Western District of Texas, Austin Division, rendered on September 3, 1970, which is not yet reported, is attached as Appendix A. The judgment of the court below is attached as Appendix B.

JURISDICTION

Appellees invoked the jurisdiction of the court below under the First Amendment of the United States Constitution and 28 U.S.C. §§ 1331, 1343, 2201, 2202, and 42 U.S.C. §§ 1981, 1983, seeking to enjoin the Appellant in the prosecution of a state court action whereby Appellant sought to enjoin certain of Appellees from violating Sections 6.11 and 6.12 of Appellant's Rules. Appellees further asked that such Sections of Appellant's Rules be declared unconstitutional and their enforcement permanently enjoined.

The Board of Regents of the University of Texas System is a state board and its members are state officers. *Splawn v. Woodward,* 287 S.W. 677 (Tex.Civ. App. 1926, no writ). The Regents' rules and regulations have the force and effect of legislative enactments. *Foley v. Benedict,* 122 Tex. 193, 55 S.W.2d 805 (1932). Its rules are not local in nature but have statewide application in that they apply to the various component institutions governed by the Appellant and located throughout the state. Articles 2585c, 2585d (Vernon, 1968 Supplement); Articles 2606c-3, 2606c-3.1, 2606c-4, 2606d (Vernon, 1970 Supplement). Consequently, a three judge district court was convened to hear the case pursuant to 28 U.S.C. § 2284 as required by 28 U.S.C. § 2281. *Phillips v. United States,* 312 U.S. 246, 61 S.Ct. 480, 85 L.Ed. 800 (1941); *Clarke v. Redeker,* 259 F.Supp. 117 (S.D. Iowa, 1966); *Sigma Chi Fraternity v. Regents of University of Colorado,* 258 F.Supp. 515 (D.C. Colo., 1966). The court below filed an opinion on September 3, 1970, holding the Rules in question to be unconstitutional; judgment decreeing the Rules to be unconstitutional and enjoining the Appellant from enforcing same was entered on September 9, 1970. Appellant's Notice of Appeal to this

Court was filed in the United States District Court, Western District of Texas, Austin Division, on October 30, 1970, within the time prescribed by 28 U.S.C. § 2101(b). The jurisdiction of this Court to review the judgment of the court below is conferred by 28 U.S.C. § 1253. *Flast v. Cohen,* 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968); *Zemel v. Rusk,* 381 U.S. 1, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965); *United States v. Georgia Pub. Serv. Comm.,* 371 U.S. 285, 83 S.Ct. 397, 9 L.Ed.2d 317 (1963); *Florida Lime & Avocado Growers v. Jacobsen,* 362 U.S. 73, 80 S.Ct. 568, 4 L.Ed.2d 568 (1960).

QUESTIONS PRESENTED

1. Where some members of the same class as plaintiffs in the court below litigate the issues relating to the constitutionality of Section 6.11, Part 1, Chapter VI, Rules and Regulations of Board of Regents of the University of Texas System in a state court, all being represented by the same attorney in both actions, is the state court judgment sustaining the constitutionality of the Rule res judicata as to that issue when plead against the other members of the class in the court below.

2. Whether Section 6.11, Part 1, Chapter VI, Rules and Regulations of Board of Regents of the University of Texas System impose an impermissible burden upon the rights of free speech and association secured by the First Amendment of the United States Constitution.

STATUTE INVOLVED

Acting pursuant to its powers under Article 2585 (Vernon, 1948) the Appellant has heretofore enacted as a part of its Rules and Regulations, Section 6.11 of Part 1 of Chapter VI which has the same force as an

enactment of the legislature. *Foley v. Benedict,* 122 Tex. 193, 55 S.W.2d 805 (1932). Section 6.11 reads as follows:

"*Regents' Rules and Regulations, Chapter VI, Part One*

6.11 Commercial solicitations will not be authorized on the campus of any component institution of The University of Texas System, except as otherwise provided in this section. Commercial solicitations include the sale, contract of sale, advertisement or promotion for sale, disposition of or contract to dispose of any item of personal property; the inducement of any person, group, or organization to contract with regard to any item of personal property, service, or anything that the offerer may offer; or the solicitation of funds or personal property. The following commercial solicitations are permissible:

(1) commercial solicitations in a Student Union Building that have been approved by the Board of Directors or by the appropriate union governing body subject to applicable institutional rules and regulations and applicable Regents' Rules and Regulations;

(2) the sale of any authorized student publication or any publication authorized by an agency of a component institution;

(3) any commercial solicitation made pursuant to a contract or agreement between the administration of a component institution and the vendor;

(4) the sale of any newspaper or other publication by means of a vending machine located in a campus building, if a certain area or areas within a campus building have been designated in advance by the institutional head or his representative as appropriate for such sales; and

(5) any commercial solicitation necessary for the normal administration, operation, and maintenance of any component institution as an educational institution."

STATEMENT

On July 8, 1969, the Regents brought an action in the 167th District Court of Travis County, Texas, to enjoin New Left Education Project, Radical Media Project, Clyde Alan Locklear, Nancy Sweeny, James Caldwell, Patricia Cuney, David Waddington, Larry Neil Winn, and other persons of a class from selling or distributing for consideration or otherwise a newspaper known as "The Rag" and from making any other commercial or noncommercial solicitation on the campus of The University of Texas at Austin except in compliance with Regents' Rules 6.11 and 6.12. On August 1, 1969, the defendants in the State court brought a class action in the court below seeking to restrain further prosecution of the State court action by the Regents, and seeking a declaration that Sections 6.11 and 6.12, Part 1, Chapter VI of the Regents' Rules are unconstitutional and enjoining their enforcement. On November 8, 1969, the original plaintiffs in the court below filed a Motion for Leave to Amend. The amended complaint joined as plaintiffs the Young Democratic Club at The University of Texas at Austin and Emma Leigh Washburn, Janis Buchanan, Carl Roberts, James R. Weddington, Seth B. Cox, Emily Calhoun, Richard Streeter, Marilyn Turboff, Paula Beaird, Robert Clayman, Lyssa Clayman and Barbara Hines and alleged that all plaintiffs were members of a class under Rule 23, F.R.C.P. On December 17, 1969, the court below entered an order allowing the joinder of these additional parties and granting plaintiff's Motion to Amend. The same order dismissed the complaint

as to the original plaintiffs in this cause and left them to assert their constitutional defenses in the pending State court action. On January 8, 1970, the Young Socialist Alliance filed its Motion for Leave to Intervene as Party Plaintiff in this cause alleging in such motion that they adopted the complaint on file. By order entered on February 10, 1970, the Motion to Intervene was granted.

On February 25, 1970, the State Court action came on to be heard upon the Regents' application for temporary injunction and at the conclusion of such hearing the State court entered a judgment which specifically sustained the constitutionality of Sections 6.11 and 6.12 of Part 1 of Chapter VI of the Regents' Rules and granted the temporary injunction against the original plaintiffs in this action and all others acting in concert with them. That judgment was not appealed. Thereafter, the plaintiffs in the action in the court below, who had joined in the action by amendment of the complaint and by intervention, filed their Motion for Summary Judgment. The Regents opposed that motion by Motion to Dismiss and by Affidavits in Opposition.

On June 26, 1970, this cause came on to be heard before a three judge district court convened pursuant to 28 U.S.C. § 2284. In an opinion dated September 3, 1970, the court below held that the judgment in the State court was not res judicata as to the issue of the constitutionality of Sections 6.11 and 6.12 of the Regents' Rules and further held that such Sections were unconstitutional in that they violated the First Amendment rights of the Appellees by unreasonably restricting free speech and association. By its judgment entered on September 9, 1970, the Regents were permanently enjoined from enforcing Sections 6.11 and 6.12.

THE QUESTIONS ARE SUBSTANTIAL

I. *Res Judicata*

The doctrine of res judicata is a long recognized and well established principle in the jurisprudence of this country. The refusal of the court below to sustain the Appellant's plea of res judicata with regard to the judgment of the 167th District Court of Travis County, Texas, constitutes a departure from the decisions of this Court and other federal courts.

The decisions in federal courts have long recognized that a judgment in an action to which some members of a class are parties is binding upon other members of the class who were not parties to the action if their interests are the same, and, it can fairly be said that those members of the class who were parties to the judgment adequately represented the absent members of the class in presenting the issues in which they all had a common interest. *Hansberry v. Lee,* 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 1111 (1940); *Montezuma Canal Co. v. Smithville Canal Co.,* 218 U.S. 371, 31 S.Ct. 67, 54 L.Ed. 1074 (1910); *Schatte v. International Alliance, Etc.,* 84 F.Supp. 669 (S.D. Calif. 1949), aff'd. 182 F.2d 158 (9th Cir. 1950), cert. den. 340 U.S. 827, 71 S.Ct. 64, 95 L.Ed. 608; *Jefferson School of Social Science v. Subversive Activities Control Board,* 331 F.2d 76 (D.C. Cir. 1963); *McIntosh v. City of Pittsburg,* 112 Fed. 705 (Cir.Ct. W.D. Penn. 1901); cf. *Stout v. Lye,* 103 U.S. 66, 26 L.Ed. 428 (1881). This is especially true where all representatives of the class had ample notice of the action in which the judgment was rendered; those of the class who are parties to the judgment have no interest contrary to those not parties; and, all are represented by the same counsel. *Gart v. Cole,* 263 F.2d 244 (2nd Cir. 1959). The only way

that the binding effect of a state court judgment upon the class may be avoided in subsequent litigation in federal court is by making a specific reservation upon the record in the state court that the federal constitutional questions are to be disposed of later in federal court. *England v. Louisiana State Board of Medical Examiners,* 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964).

Upon the record in this cause, it appears from the Complaint, Motion For Leave To Amend, Amended Complaint, the Order of the court below entered on December 17, 1969, Motion For Leave To Intervene, Order Granting Leave To Intervene entered on February 10, 1970, that all who were plaintiffs in the court below are members of a class who assert that the Regents' Rules place an impermissible burden upon their First Amendment rights of free speech and association. The Complaint, Amended Complaint, and exhibits attached to Defendant's Second Amended Answer, show that a portion of the class were defendants in the State court action and they specifically raised the same constitutional issues in that court regarding the same Regents' Rules. The judgment of the State court shows upon its face that it considered these constitutional issues and passed upon them adversely to the contentions of defendants in that cause. That judgment was not appealed from and was res judicata of those issues in the court below.

The court below stated in its opinion that just because "all the parties in federal courts constituted a class under Federal Rule 23, it still does not follow that the state court injunction issued against some of the federal class members will support res judicata as to the remainder of the class." This statement is dia-

metrically opposed to the principles laid down in the cases cited above.

The court below further held that since the State court judgment was one for temporary injunction it was not a final judgment and could not support a plea of res judicata.[1] This is ordinarily true, but under the decided cases in this State a temporary injunction judgment is final for purposes of res judicata where the ultimate and controlling issues forming the basis of the action or defense are put in issue and passed upon by the court. In such cases, the finality of the determination of such issues does not depend upon whether it was pursuant to an "interlocutory order," it would be "farcical" to require the same court to cover the same ground in order to enter a "final judgment" upon the same issues. *Wilson v. Abilene Ind. Sch. Dist.*, 204 S.W.2d 407 (Tex.Civ.App. 1947, error ref. n.r.e.); *Daniel v. Kittrell*, 188 S.W.2d 871 (Tex.Civ.App. 1944, no writ); cf. *Hayden v. City of Houston*, 305 S.W.2d 798 (Tex.Civ.App. 1957, error ref. n.r.e.); *Farris, Inc.* v. *United Specialty Advertising Co.*, 385 S.W.2d 456 (Tex.Civ.App. 1964, error ref. n.r.e.) This same principle was announced and followed by the court in *Sewerage Commission v. Activated Sludge, Inc.*, 81 F.2d 22, 23 (7th Cir. 1936). The court below was bound to follow the law as announced by these decisions and treat the judgment of the State court as final upon the constitutional issues litigated. *Caterpillar Tractor Co.*

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[1]The Court below cited *Miers v. Brouse*, 153 Tex. 54, 271 S.W.2d 419 (1954) in support of its holding. It is true that it was so held in that case, but resort to the opinion of the court of civil appeals in that case (261 S.W.2d 734) shows that the temporary injunction order merely enjoined one of the claimants to a fund from disposing of it without adjudicating ownership of the fund. The holding is not authoritative with regard to temporary injunction orders that do adjudicate the basic issues of the cause.

v. International Harvester Co., 120 F.2d 82 (3rd Cir. 1941). Its refusal to do so presents a substantial question for the consideration of this Court.

II. *The Extent Of The Appellant's Authority To Regulate Expression Connected Action.*

Although the court below recognized in its opinion that the prevention of "substantial disorder or material disruption" of an educational institution's activities is a compelling state interest which justifies "some reasonable regulation" of First Amendment rights, it nonetheless found that Section 6.11 is "unconstitutionally overbroad" and "unreasonably restrictive of the clearly protected activities engaged in by the plaintiffs [appellees] in this case." In reaching this conclusion, the court below failed to distinguish between regulations directed at *expression* and those directed toward *action.*

Section 6.11 is not directed toward expression or speech, but rather to the conduct or action of commercial solicitation as defined in that Section. Reasonable and nondiscriminatory regulations pertaining to time, place and manner of speech connected conduct upon public owned property are valid even though the speech element may be incidentally limited. *Walker v. Birmingham*, 388 U.S. 307, 87 S.Ct. 1824, 18 L.Ed.2d 1210 (1967); *Adderly v. Florida*, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966); *Cox v. Louisiana*, 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 149 (1966); *Poulos v. New Hampshire*, 345 U.S. 395, 73 S.Ct. 760, 97 L.Ed. 1105 (1952); *Kovacs v. Cooper*, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1948); *Cox v. New Hampshire*, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941).

Property dedicated to educational purposes occupies a unique position in the category of public property.

Unlike streets, parks and playgrounds, school premises are not maintained for the use of the general public, but are dedicated to education. Not only does the state have a duty to provide and maintain an effective and efficient educational system, it has a duty to protect and further that system. Rules and regulations directed toward conduct likely to disrupt school routine are not only proper, but necessary. Speech and speech associated conduct, whether in or out of the classroom "which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or encroaches upon the rights of others is, of course, not immunized by the constitutional guarantees of freedom of speech." *Tinker v. Des Moines Community School Dist.*, 393 U.S. 503, 513, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). First Amendment rights must be "applied in light of the special characteristics of the school environment." Id. at 506.[2]

Regulations of school authorities directed toward time, place, and manner of conduct, even though speech connected, are to be sustained if they are nondiscriminatory and reasonably related to promoting that degree of order considered necessary to an efficient and effective educational system. In judging the validity of such regulations, the courts are not to consider whether they are wise or expedient but only whether they are a reasonable exercise of the power and discretion of the school authorities. *Barker v. Hardway*, 283 F.Supp. 288 (S.D. W.Va. 1968) aff'd 399 F.2d 638 (5th Cir. 1968) cert. den. 394 U.S. 905, 89 S.Ct. 1009, 22 L.Ed.2d 217; *Burnside v. Byars*, 363 F.2d 744 (5th

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[2]For complete discussion of First Amendment rights on campus, see, Wright, *The Constitution On Campus*, 22 VAND. L. REV. 1027, 1037.

Cir. 1966); *Blackwell v. Issaquena County Board of Ed.*, 363 F.2d 749 (5th Cir. 1966); *General Order on School Discipline*, 45 F.R.D. 133, 145 (1968); cf. *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed. 2d 672 (1968).

It is submitted that the court below departed from the standards announced by the foregoing authorities when it held Section 6.11 to be invalid. Rather than judging whether, upon the record before it, the rule was a reasonable exercise of the discretion of the Appellant Regents, the court below merely substituted its discretion for that of the Appellant and determined that Section 6.11 was not a wise or expedient way to accomplish a legitimate purpose. This the court below was unauthorized to do. Those closest to the campus situation are better equipped than a federal district court to determine and evaluate the potential for disruption and the expedient way to eliminate it.

The record in this cause fully supports the reasonableness of Section 6.11. It is not discriminatory upon its face nor does the record show discriminatory application. The record shows that there are presently over 36,000 students and over 7,000 employees of the University of Texas at Austin. These people are concentrated in an area of approximately 225 acres which is dedicated by law to university purposes. Such a concentration of persons cannot help but appeal to every sort of solicitor and salesman as a ready-made marketplace. The record shows past experience of disruption of classroom and laboratory activity, and annoyance of teaching staff and students by commercial solicitations, both speech connected and nonspeech connected. Section 6.11 is directed toward the prevention of such disruptions and the preservation of the campus for the purpose intended. Commercial solicitations are a prop-

er subject of regulation even though speech connected. *Valentine v. Chrestensen,* 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262 (1941).

Section 6.11 does not restrict freedom of speech except as it is incidental to the activity of solicitation. Appellant has made no effort, by regulation or otherwise, to censor the content of any literature or speech with which Appellees are connected. The real issue presented by this cause is not one of discrimination, either in the promulgation or enforcement of the Appellant's Rules, neither is it a denial of the right of free speech or press. It is rather, a conflict between a group of students and the duly constituted governing board of the University System as to who shall have the ultimate right to establish policy with regard to time, place, and manner of solicitations upon the campus. The record shows that numerous newspapers are consistently sold at the designated areas on the campus. Appellees have not shown that they cannot reasonably function in such areas, in fact they have never sought to sell their literature in those areas.

The court below further found fault with Section 6.11 (2) in that it allows the sale of "any publication authorized by an agency of a component institution" and thus grants undefined licensing power to the agency. In so holding, the court below wholly misconceived the purpose and intent of this provision and ignored the record relating to its application. The purpose of this provision is to allow the various colleges and departments to sell pamphlets, journals, and books dealing with educational subjects of the department. It has been applied only in this manner. (Answer to Interrogatory No. 2.) Such publications are sold only by subscription or at the office of the particular college or department. (Stipulation No. 6.) For these reasons the

court below erred in interpreting this provision as a licensing regulation.

CONCLUSION

It is submitted that the questions presented by this appeal are substantial and of public importance to the educational institutions throughout the United States, warranting plenary consideration by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, W. O. Shultz, II, one of the attorneys for the Appellant, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ---- day of December, 1970, I served a copy of the foregoing Jurisdictional Statement on the Appellees by depositing a copy in the United States Mail, postage prepaid, and addressed to the attorney of record for Appellees as follows: David R. Richards, 205 AFL-CIO Building, 308 West 11th Street, Austin, Texas 78701.

W. O. Shultz, II

APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL ACTION NUMBER A-69-CA-106

NEW LEFT EDUCATION PROJECT, YOUNG DEMOCRATIC CLUB AT THE UNIVERSITY OF TEXAS AT AUSTIN, YOUNG SOCIALIST ALLIANCE, CLYDE ALAN LOCKLEAR, NANCY SWEENY, JAMES CALDWELL, PATRICIA CUNEY, DAVID WADDINGTON, LARRY NEIL WINN, EMMA LEIGH WASHBURN, JANIS BUCHANAN, CARL ROBERTS, JAMES R. WEDDINGTON, SETH B. COX, EMILY CALHOUN, RICHARD STREETER, MARILYN TURBOFF, PAULA BEAIRD, ROBERT KLAYMAN, LYSSA KLAYMAN AND BARBARA HINES

vs.

BOARD OF REGENTS OF
THE UNIVERSITY OF TEXAS SYSTEM

MEMORANDUM OPINION

BEFORE: JUDGE HOMER THORNBERRY, Circuit Judge, JUDGE D. W. SUTTLE and JUDGE JACK ROBERTS, District Judges

PER CURIAM

This suit was born of a state court proceeding instituted by the University of Texas Board of Regents against the New Left Education Project and a num-

ber of individuals, seeking to restrain them from violating two Regents' rules by distributing a newspaper known as the *Rag* on the Austin campus of the University of Texas. The defendants in that suit filed this case requesting that this Court enjoin the further prosecution of the state court suit, and declare the Regents' rules which found the basis of that suit unconstitutional.

This Court met in November, 1969, and decided this case was properly one to be heard by a three-judge court convened under 28 U.S.C. § 2281 (1964). The Court also allowed joinder as parties plaintiff the Young Democratic Club at the University of Texas at Austin, and a number of individual University of Texas students interested in the "free flow of ideas" and the "full enjoyment of First Amendment rights" on the University of Texas campus. At the same time, the Court refused the original plaintiffs declaratory and injunctive relief and dismissed them as plaintiffs so that there would be no interference with the state judge's adjudication of the proceedings pending against them in state court. The remaining plaintiffs, however, were allowed to challenge the two rules "in further proceedings" in the Court. The Young Socialist Alliance of the University of Texas was subsequently also allowed to intervene as a party plaintiff. The case is now before us on the plaintiffs' motion for summary judgment and the defendants' motion to dismiss.

I.

The defendants argue that this suit should be dismissed because the state court judgment rendered in the suit against the severed plaintiffs in this case is res judicata on the question of the constitutionality of the two Regents' rules challenged here. The state

court has determined that the two rules "are not in violation of the First and Fourteenth Amendments," and has granted a temporary injunction against the New Left Education Project, individuals associated with the publication and distribution of the *Rag,* and all persons acting in concert with them, restraining them from "selling or distributing the newspaper known as the *Rag* upon the campus of The University of Texas at Austin . . ." and from engaging in any other violation of the commercial and non-commercial solicitation rules involved in this case.

Assuming *arguendo* that this Court's earlier decision to allow joinder of parties plaintiff under Federal Rule 20(a) was, as the Regents argue, in fact a determination that all the parties in federal court constituted a class under Federal Rule 23, it still does not follow that the state court injunction issued against some of the federal class members will support res judicata as to the remainder of the class. In the first place, there is no final judgment in the state court. Under Texas law, a temporary injunction "[can] not be the basis of res judicata since it is only an interlocutory order. . . ." *Miers v. Brouse,* 153 Tex. 54, __, 271 S.W.2d 419, 421 (1954). Thus there is no full-faith-and-credit issue presented in this case which might justify a holding of res judicata. Compare *Gart v. Cole,* 263 F.2d 244 (2d Cir. 1959).

Secondly, the state court proceeding never purported to deal with a "class" any larger than individuals associated with the publication and distribution of the *Rag.* The remaining plaintiffs in the larger "class" in the federal lawsuit were never in state court, and are certainly not bound by even the most expansive reading of that court's injunction.

In the final analysis the Regents' res judicata argument amounts to no more than a reliance on *England v. Board of Medical Examiners,* 375 U.S. 411 (1964), for the proposition that in this case the entire federal "class" voluntarily chose to fully litigate its constitutional claims as a class in state court. This assertion is unsupportable. On the basis of a "technical" rule —the anti-injunction statute, 28 U.S.C. § 2283 (1964) —and the policy of federal-state comity, this Court earlier temporarily denied some of the plaintiffs the right to litigate their federal claims in federal court. The Regents' suggestion that this Court's respect for the policy of comity entitles them to a judgment of res judicata flies in the face of the strong policy in favor of respecting a Plaintiff's choice of a federal forum for litigating his federal claims. As the Court in England stated, "[t]he right of a party plaintiff to choose a Federal Court where there is a choice cannot be properly denied," 375 U.S. at 413, quoting *Willcox v. Consolidated Gas Co.,* 212 U.S. 19, 40 (1909).

Even if the *Rag* plaintiffs could be said to have defended the state court suit in such a way as to have voluntarily forgone their right to return to this Court,[1] the remaining plaintiffs, having never even been in state court, can hardly be held to have relinquished their right to return, especially since this Court's earlier order left those plaintiffs in this Court for "further proceedings" in their case.

Defendants' motion to dismiss is accordingly denied. Since there are no material facts at issue, we find this case ripe for determination on the plaintiffs' motion for summary judgment.

II.

The Regents Rules at issue prohibit both "com-

mercial'" and "non-commercial" solicitation on the campus of any component institution of the University of Texas System. "Commercial" solicitation is broadly defined to include not only the sale or contract for sale of any item of personal property, but also the "inducement of any person . . . to contract with regard to . . . anything the offeror may offer." Commercial solicitation is prohibited except for five permissible categories: (1) solicitation inside a Student Union Building that has been approved by the governing body of the Union; (2) the sale of any publication authorized by an agency of the component institution; (3) solicitation pursuant to a contract between the vendor and the governing authority of a campus; (4) the sale of publications from vending machines at approved locations; and (5) any solicitation necessary for the educational purposes of the University.[4] Non-commercial solicitation is not defined in Rule 6.12. Nonetheless, such solicitation is prohibited without the prior approval of the component institution head or his delegate. Approval may be granted for "public benevolent purposes," but not for fund-raising for the benefit of a particular person or group. However the institution head of a campus may approve the solicitation of funds by registered student organizations from their members, but only "at official meetings of the organization."[5] The Plaintiffs argue that both rules violate their first amendment rights of speech and association because they are overly broad and are mere licensing schemes. As these rules are currently applied, neither the Young Democrats nor the Young Socialist Alliance can solicit dues from potential members of their organizations on campus without permission of the institutional head, and then only at official meetings.[6] Moreover, neither group can sell political material, such as tracts by Leon Trotsky or even campaign

bumper stickers, on the main malls of the Austin campus. It is undisputed that these rules seriously impede the associational activities of the organizations, primarily because the rules decrease their ability to procure both members and funds. It is also undisputed that a great deal of commercial and non-commercial solicitation coming within the heretofore noted exceptions to the rules is allowed on the Austin campus.[7] It is not clear, however, which of the two rules questioned prohibit the activities engaged in by the plaintiffs. For example, solicitation of dues from new members by either organization is purportedly covered by the terms of the non-commercial solicitation rule, which prohibits such solicitation without approval of the institutional head, and then only at official meetings of the organization. Thus solicitation of dues on campus would violate the non-commercial rule. But it seems clear that such solicitation would also constitute "the solicitation of funds" within the meaning of the commercial solicitation rule. Indeed, under the commercial rule, soliciting a person to become a dues-paying member of an organization would constitute a violation of that portion of the rule which prohibits the "inducement of any person . . . to contract with regard to . . . anything that the offeror may offer"—namely, membership in the organization. Moreover, some of the activities at issue—selling books, pamphlets, newspapers and campaign paraphernalia for fund-raising purposes—are clearly covered by the prohibition against the commercial sale of personal property. The sale of a newspaper like the Young Socialists' *The Militant,* if not for profit, might be either commercial or non-commercial. It seems significant that in the state injunction suit the Regents claimed that the activities of the *Rag* (a supposedly non-profit organ of the New Left Education Project) violated both

rules. Although the rules are not challenged on the grounds of vagueness there is enough ambiguity in their coverage to warrant this Court's considering the rules together for purposes of the overbreadth question raised by the plaintiffs.

III.

We start from the dual premises that soliciting dues-paying members for a lawful organization—especially a political one—is speech and associational activity of a fairly high order, see *N.A.A.C.P. v. Alabama,* 357 U.S. 449 (1958); *Schneider v. State,* 308 U.S. 147 (1939), as is distributing literature which "communicate[s] thoughts between citizens, and discuss[es] public questions," *Hagne v. C.I.O.,* 307 U.S. 496, 515 (1959)—especially when its content is primarily political. Such literature is no less protected by virtue of the fact that it is sold, whether with or without the realization of an actual profit. *Ginzburg v. United States,* 383 U.S. 463, 474 (1966). *New York Times v. Sullivan,* 376 U.S. 254, 266 (1964).

While it is often said that first amendment rights are not absolute, and that conduct incidental to the exercise of speech in public places is subject to reasonable nondiscriminatory regulation governing time, manner, and place, *Cantwell v. Connecticut,* 310 U.S. 296 (1939), it is well-settled law that once it is determined that state action impinges on high-order first amendment rights—which these rules undoubtedly do—then the burden of proof is on the state to show that the governmental interests asserted to support the impingement are "compelling." *N.A.A.C.P. v. Alabama,* 357 U.S. 449 (1958); *Sweezy v. New Hampshire,* 354 U.S. 234, 265 (Frankfurter, J., concerning) (1957). Absent such a showing, any "time," "manner," or

"place" regulation is unreasonable. An educational institution's interest in preventing substantial disorder or material disruption of classroom activity is, of course, such a "compelling" state interest, which justifies some reasonable regulation. *Tinker v. Des Moines Community School District,* 393 U.S. 503, 513 (1969). Not surprisingly, the Regents assert that preventing such disruption is precisely the purpose of the rules.* From this premise, however, it does not follow that any rule the Regents might pass is impervious to constitutional attack. For it is quite clear that even "[l]egitimate legislative goals cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Elfbrandt v. Russell,* 384 U.S. 11, 18 (1966). This "less restrictive means" principle is especially applicable to regulations that impinge on first amendment speech and associational rights, even when accompanied by conduct. *Talley v. California,* 362 U.S. 60 (1960); *Schneider v. State,* 308 U.S. 147 (1939); see *Hiett v. United States,* 415 F.2d 664 (5th Cir. 1969), cert. denied 397 U.S. 936 (1970).

Thus, while the Regents can certainly prohibit disruptive or fraudulent solicitation, they must do so in a manner that strikes at the very evil they wish to prevent. Applying this principle to the case at hand, we find that the Regents' solicitation rules at issue are unconstitutionally overbroad.

The severe limitations the rules place on solicitation generally are unreasonably restrictive of the clearly protected activities engaged in by the plaintiffs in this case. Thus by broadly limiting all solicitation in the two rules, the Regents have simply failed to speak with that small calibre precision required of regulations touching first amendment rights.

This holding in no way impairs the right of the Regents to prohibit activity disruptive of the educational processes on campus. There have been complaints that magazine salesmen have disrupted classes by passing out subscription forms during class meetings. Such activity is clearly prohibitable by a non-discriminatory rule forbidding classroom disruption. Similarly, to the extent that campus congestion is a problem created by setting up solicitation booths, the Regents could formulate a reasonable, non-discriminatory rule limiting the number of such booths allowed on campus at any one time. If litter is a concern, an anti-litter rule would be appropriate. Perhaps most importantly for purposes of achieving the primary stated objective of the present rules, a much narrower and constitutionally permissible rule could undoubtedly be devised that would severely limit "purely commercial" solicitation on campus, see *Valentine v. Chrestensen*, 316 U.S. 52 (1942). But cf. *Grazburg v. United States*, 383 U.S. 463, 474 n. 17 (1966); *New York Times v. Sullivan*, 376 U.S. 254, 266 (1964); *Hiett v. United States, supra.*

IV.

The constitutional vice of the presents Regents' rules governing solicitation extends beyond their overbreadth. They are also invalid as licensing regulations that do not set out adequate guidelines for the exercise of the licensing authority's power to grant or deny permission to exercise first amendment rights. Despite the commercial solicitation rules' broad prohibition of the sale of publications on campus outside of certain areas, any publication can be sold on campus if it has been "authorized by an agency of a component institution." There are no standard governing the issuance of such authorization. There is a similar provision in the noncommercial solicitation rule, which permits such

solicitation if the institutional head finds that the fund raising is for "the needy or suffering, relief of the poor or for public benevolent purposes." As the plaintiffs point out, we are left to surmise what causes constitute "public benevolent purposes," as are the institutional heads who are charged with the administration of this regulation. Thus these regulations vest standardless discretion in the institutional head or his agency-delegate to grant or withhold exercise of first amendment rights. It is well settled law that regulations cannot be allowed to stand when they make enjoyment of first amendment freedoms contingent upon the will of an administration. See *Staub v. City of Baxley,* 355 U.S. 313 (1958); *Largent v. Texas,* 318 U.S. 418 (1943); *Schneider v. State,* 308 U.S. 147 (1939); *Lovell v. City of Griffin,* 303 U.S. 444 (1938).

It is therefore ADJUDGED that Sections 6.11 and 6.12 of the Regents Rules and Regulations are unconstitutional; it is further ORDERED that the Regents are hereby ENJOINED from enforcing either section.

Counsel for the plaintiffs will submit an appropriate form of Judgment within ten (10) days from date of the filing of this Memorandum Opinion.

Signed at Austin, Texas, this 3rd day of September, 1970.

JUDGE HOMER THORNBERRY
JUDGE D. W. SUTTLE
JUDGE JACK ROBERTS

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[1]They have not sought to return, so this Court does not need to decide the issue.

[2]University of Texas Board of Regents, Rules and Regulations, Ch. VI, pt. 1, §6.11.

[3]University of Texas Board of Regents, Rules and Regulations, Ch. VI, pt. 1, §6.12.

6.11 Commercial solicitations will not be authorized on the campus of any component institution of the University of Texas System, except as otherwise provided in this section. Commercial solicitations include the sale, disposition of or contract to dispose of any item of personal property; the inducement of any person, group, or organization to contract with regard to any item of personal property, service, or anything that the officer may offer; or the solicitation of funds or personal property. The following commercial solicitations are permissible:

(1) commercial solicitations in a Student Union Building that have been approved by the Board of Directors or by the appropriate union governing body subject to applicable institutional rules and regulations and applicable Regents' Rules and Regulations;

(2) the sale of any authorized student publication or any publication authorized by an agency of a component institution;

(3) any commercial solicitation made pursuant to a contract or agreement between the administration of a component institution and the vendor;

(4) the sale of any newspaper or other publication by means of a vending machine located in a campus building, if a certain area or areas within a campus building have been designated in advance by the institutional head or his representative as appropriate for such sales; and

(5) any commercial solicitation necessary for the normal administration, operation, and maintenance of any component institution as an educational institution.

6.12 No noncommercigal solicitations, including fund raising for charity, shall be permitted on a campus of a component institution of The University of Texas System without the prior approval of the institutional head or his delegate.

6.121 Such approval by the institutional head may be granted for solicitation or fund raising for the needy or suffering, relief of the poor, or for public benevolent purposes, but it may not be granted for the personal benefit of an individual, group, or registered student

organization, to pay any fee, fine, or other charge arising from a violation of federal, state, or local law.

6.122 Any noncommercial solicitation, including fund raising for charity, that is approved by the institutional head or his delegate shall be conducted in accordance with reasonable institutional regulations regarding time, place, procedure and financial reporting and accountability.

6.123 Notwithstanding the provisions of Section 6.121 above, with the approval of the institutional head or his delegate, a registered student organization may solicit or raise funds from its own members for the benefit of the organization but only at official meetings of the organization.

[6]The facts also establish that campus organizations are allowed to solicit dues and members during registration week at the beginning of each semester. The authority for this *de facto* exception to the facially all-inclusive rule against non-commercial solicitation, which purports to cover dues solicitation, is unclear.

[7]For example, various student publications, including the Texas Ranger, the Daily Texan, the Texas Quarterly, and the Texas Law Review, are sold on campus, and the Student Association sells life and hospitalization insurance, all under exceptions to the commercial solicitation rule. Examples of non-commercial solicitation permitted on campus are sales of balloons to solicit funds for the needy, sales of cakes and cookies for home economics departmental scholarships, and maintenance of a booth on campus for membership enlistment and literature distribution by the Campus Crusade for Christ.

[8]The Chairman of the Board of Regents asserts that the object of the rules is to "keep vendors, such as insurance salesman, balloon salesman, and other kinds of salesmen, as well as those persons soliciting funds from coming on the campus where we have a highly concentrated group of people." Further, the University "does" not want solicitors or salesman, or whatever kind, coming onto campus, walking up and down the halls, and knocking on doors trying to sell their wares, thus interferring with the academic activities of the institution."

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL ACTION NUMBER A-69-CA-106

NEW LEFT EDUCATION PROJECT, YOUNG DEMOCRATIC CLUB AT THE UNIVERSITY OF TEXAS AT AUSTIN, YOUNG SOCIALIST ALLIANCE, CLYDE ALAN LOCKLEAR, NANCY SWEENY, JAMES CALDWELL, PATRICIA CUNEY, DAVID WADDINGTON, LARRY NEIL WINN, EMMA LEIGH WASHBURN, JANIS BUCHANAN, CARL ROBERTS, JAMES R. WEDDINGTON, SETH B. COX, EMILY CALHOUN, RICHARD STREETER, MARILYN TURBOFF, PAULA BEAIRD, ROBERT KLAYMAN, LYSSA KLAYMAN AND BARBARA HINES

vs.

BOARD OF REGENTS OF
THE UNIVERSITY OF TEXAS SYSTEM

JUDGMENT

On the 26th day of June, 1970, the above cause came on to be heard on Plaintiffs' Motion for Summary Judgment before a three-judge court comprised of United States Circuit Judge Homer Thornberry, United States District Judge Jack Roberts, and United States District Judge D. W. Suttle, and the Court having considered all of the evidence, stipulations of the parties, and briefs and argument of counsel, in accordance with the Court's opinion heretofore filed on September 3rd, 1970, ORDERS, ADJUDGES and DECREES as follows:

1.

There being no material facts at issue, this matter is ripe for determination on Plaintiffs' Motion for Summary Judgment.

2.

Pursuant to the provisions of 28 U.S.C., Section 2201, the Court declares that the activities engaged in by the Plaintiffs on the University of Texas campus in solicitation of membership dues and/or sale of literature constitutes speech and associational activities protected by the First Amendment to the United States Constitution, and inasmuch as Regents' Rules and Regulations unreasonably interfere with these constitutional rights, Sections 6.11 and 6.12 of the Regents' Rules and Regulations are hereby declared to be unconstitutional and unenforceable.

3.

Pursuant to the provisions of Rule 65 of the Federal Rules of Civil Procedure the Court permanently enjoins Defendant Board of Regents of the University of Texas System, and all of the Defendant's agents, servants, employees and attorneys and all other persons in active concert or participation with them from further enforcement against the Plaintiffs of Article 6.11 and Article 6.12 of the Rules and Regulations of the Board of Regents of the University of Texas System.

Signed and entered this 9th day of September, 1970.

JACK ROBERTS, Judge
United States District Court
for the Western District of Texas

APPENDIX C

IN THE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL ACTION NO. A-69-CA-106

NEW LEFT EDUCATION PROJECT, ET AL.

v.

BOARD OF REGENTS OF THE
UNIVERSITY OF TEXAS SYSTEM

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Defendant Board of Regents of the University of Texas System in the above entitled and numbered cause hereby appeals to the Supreme Court of the United States from the judgment entered in this cause on the 9th day of September, 1970. This appeal is taken pursuant to 28 U.S.C. §1253.

CRAWFORD C. MARTIN
Attorney General of Texas

W. O. SHULTZ II
Assistant Attorney General

JAMES C. McCOY
Assistant Attorney General

P. O. Box 12548
Capitol Station
Austin, Texas 78711

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served upon the attorney of record for the Plaintiffs, David R. Richards, by placing same in the United States mail, postage prepaid, addressed to his office at 205 Texas AFL-CIO Building, 308 West 11th Street, Austin, Texas 78701.

W. O. SHULTZ II

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

BOARD OF REGENTS OF THE UNIVERSITY
OF TEXAS SYSTEM,

Appellant

v.

NEW LEFT EDUCATION PROJECT, et al.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

MOTION TO DISMISS AND/OR AFFIRM

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Of Counsel:
CLINTON & RICHARDS

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

No. 1100

BOARD OF REGENTS OF THE UNIVERSITY
OF TEXAS SYSTEM,

Appellant

v.

NEW LEFT EDUCATION PROJECT, et al.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

MOTION TO DISMISS AND/OR AFFIRM

Appellees in the above entitled case move to dismiss and/or affirm on the alternative grounds that this Court lacks jurisdiction inasmuch as this matter did not require the convening of a three-judge court under 28 U.S.C. Sec. 2281, or if this Court has jurisdiction the decision below should be affirmed because the question presented is so unsubstantial as not to need further argument.

STATEMENT OF THE CASE

The Young Democratic Club of the University of Texas, The Young Socialist Alliance, and certain individual students at the University of Texas at Austin have obtained declaratory and injunctive relief against the University of Texas Board of Regents. The judgment prohibits the Defendants from enforcing, as against the Plaintiffs, Section 6.11 and 6.12 of the Regents Rules and Regulations. The three-judge court below found these rules, which purport to limit commercial and non-commercial solicitation on the University of Texas campus, to be "unconstitutionally overbroad" and "unreasonably restrictive of the clearly protected activities engaged in by the Plaintiffs." (Jurisdictional Statement, p. 23).

The trial court's conclusion is founded on a record which discloses that the Regents, under the guise of regulation of commercial and non-commercial solicitation, substantially restricted the legitimate political activity of the Plaintiffs, while permitting comparable activity by non-political organizations. The University rules, for example, permitted on campus, "a balloon sale . . . to draw attention to the unfortunate circumstances of the poor people in East Austin" and other solicitation of funds for the "needy or suffering" (Price Affidavit), while denying The Young Democrats and The Young Socialists the right to solicit membership dues (Stipulation). The same rules permitted the Student Association to sell "life and hospitalization insurance" and the Acappella Choir to sell "stickers, records," etc. (Defendants' Answers to Interrogatories), while prohibiting The Young Democrats from selling political bumper stickers and The Young Socialists from selling their publication "The Militant" (Dolfi and Kincaid Affidavits).

In light of the undisputed evidence of unreasonable restraints upon the First Amendment rights of the Plaintiffs, the Court granted Plaintiffs' prayer for declaratory relief and enjoined the Defendants "from further enforcement against the Plaintiffs of

Articles 6.11 and 6.12 of the Rules and Regulations of the Board of Regents of the University of Texas system" (Judgment).

THE COURT LACKS JURISDICTION OF THIS APPEAL

A three-judge court was convened at the behest of the Defendants, and not at the request of the Plaintiffs. It continues to be the view of the Plaintiffs that the injunction against the enforcement of a rule of the Board of Regents does not require the convening of a three-judge court under Section 2281 of Title 28. While we recognize that the rules in question apply to various institutions under the Regent's jurisdiction, there are many state-supported colleges and universities in Texas which are not governed by the defendant's rules. The rules clearly are not of "general and statewide application" as contemplated by Section 2281, *Moody v. Flowers*, 387 U. S. 97, 101 (1967). It has been a consistent view that "congressional enactments providing for the convening of three-judge courts must be strictly construed," *Allen v. State Board of Elections*, 393 U. S. 544, 561 (1969). Surely a three-judge court was not here required if the purpose of 2281 is to "prevent a single federal judge from being able to paralyze totally the operation of an entire regulatory scheme . . . by issuance of a broad injunctive order," *Kennedy v. Mendoza-Martinez*, 372 U. S. 144, 154 (1963); *Moody v. Flowers*, 387 U. S. 97, 101 (1967).

THERE IS NO BASIS FOR THE CLAIM OF RES JUDICATA

The assertion of res judicata is founded upon the grant by a state court of temporary injunction against the distribution on the University of Texas campus of an underground newspaper known as "The Rag." None of the parties plaintiff in the federal proceeding were named as parties in the state court action, nor

were they persons otherwise associated in the distribution of "The Rag."[1]

The claim of res judicata founders at the outset because under Texas law the grant of a temporary injunction is an interlocutory order which will not support a claim of res judicata. Thus the Texas Supreme Court in *Miers v. Brouse*, 271 S. W. 2d 419, 421 (1954) held:

> "That the order granting the temporary injunction could not be the basis of res adjudicata since it is only an interlocutory order . . ."

No one suggests that the force of the *Miers* case has been impaired by any later decisions of the Texas Supreme Court.

Even if a temporary injunction would sustain a plea of res judicata, it would not affect the plaintiffs in this case who were never parties to the state court proceeding and who, although they might have enjoyed similar concern about the impact of the Regents' rules, did not share the requisite common interest with the state court litigants. As the Supreme Court recognized in *Hansberry v. Lee*, 311 U. S. 32, 44 (1940):

> "It is one thing to say that some members of a class may represent other members in a litigation where the sole and common interest of the class in the litigation, is either to assert a common right or to challenge an asserted obligation . . . It is quite another to hold that all those who are free alternatively either to assert rights or to challenge them are of a single class, so that any group merely because it is of the class so constituted, may be deemed adequately to represent any others of the class in litigating, their interest in either alternative. Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires."

[1] Although at one point the Defendants in the state court "Rag" litigation had been parties plaintiff in the federal proceeding, the federal court dismissed them as parties plaintiff because of the pendency of the state court action, retaining jurisdiction to deal with the issues presented by the other plaintiffs who were not parties to the state court action.

Finally, this Court's decision in *England v. Louisiana State Board of Medical Examiners,* 375 U. S. 411 (1964), does not seem at all in point, for there is no suggestion that the plaintiffs in the federal court ever litigated in the state court and hence could hardly make the "reservation" of the right to return to the federal tribunal.

THE REGENTS' RULES UNDER ATTACK WERE PROPERLY FOUND UNCONSTITUTIONAL

Appellant fails to offer reasonable support for its rules. The rules did not distinguish, as Appellant suggests, between *action* and *expression.* Publications of all kinds could be freely distributed on the campus; they could not, however, be sold without University sanction. The rules made no distinction as to time, place or manner of distribution, rather the rules banned the sale of political literature on campus on the sole basis that such activity was "commercial" in nature. "[T]o sanction considerations of this fact might indeed induce self-censorship, and offend the frequently stated principle that commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment." *Ginzburg v. United States,* 383 U. S. 463, 474 (1966).

CONCLUSION

We respectfully submit that this appeal should be dismissed for lack of jurisdiction, or in the alternative that the judgment below should be affirmed.

Respectfully submitted,

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70-55

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

[redacted]

BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM,
Appellant

v.

NEW LEFT EDUCATION PROJECT, ET AL.,
Appellees

Appeal From The United States District Court
For The Western District of Texas

BRIEF FOR APPELLANT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. 1100

BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM,

Appellant

v.

NEW LEFT EDUCATION PROJECT, ET AL.,

Appellees

Appeal From The United States District Court
For The Western District of Texas

BRIEF FOR APPELLANT

OPINION BELOW

The opinion of the district court appears in the Appendix at page 164 and has not been reported.

JURISDICTION

Regents invoke the jurisdiction conferred upon this Court by 28 U.S.C. §1253 to review by direct appeal an order granting a permanent injunction in a civil action required by Act of Congress to be heard and determined by a three-judge district court.

The judgment was entered on September 9, 1970 (A. 2, 177). Since it was a final adjudication on the merits of the issues presented, Regents filed Notice of Appeal in the district court on October 30, 1970 (A. 2), which was within the 60-day period prescribed by 28 U.S.C.

§2101(b), and in compliance with Rule 11(3) of this Court. On December 14, 1970, Regents complied with the requirements of Rule 13 of this Court. Thereafter, this Court by its Order of March 1, 1971, postponed further consideration of the question of jurisdiction until the hearing of the case on the merits. — U.S. —, 91 S.Ct. 939, 28 L.Ed.2d 214. The foregoing clearly demonstrates the timeliness of the procedural steps necessary to invoke the jurisdiction of this Court.

There is no question that the Regents appear before this Court burdened with the restraints of a permanent injunctive order of the court below (A. 173, 176). That much is clear. Therefore, aside from the timeliness of procedural niceties, the ultimate question of jurisdiction under 28 U.S.C. §1253 depends upon whether this case is one that was required by Act of Congress to be heard by a three-judge district court. *Flast v. Cohen,* 392 U.S. 83 (1968); *Zemel v. Rusk,* 381 U.S. 1 (1965); *Florida Lime & Avocado Growers v. Jacobsen,* 362 U.S. 73 (1960); *Stainback v. Mo Hock Ke Lok Po,* 336 U.S. 368 (1948). However, since the judgment entered (A. 176) was signed by only the district judge in whose court this case was originally filed, we must, at the threshold, dispose of the question of whether this was the judgment of a three-judge court. Upon the suggestion of Regents that this case was required by 28 U.S.C. §2281 to be heard and determined by a district court of three judges (A. 15), the Chief Judge of the Court of Appeals for the Fifth Circuit, acting pursuant to 28 U.S.C. §2284, designated a three-judge district court to hear and determine this cause (A. 18). The district judge in whose court this case was originally filed, together with another district judge and a circuit judge were designated as the three-judge district court (A. 18). By an order entered on December

17, 1969, signed by all three judges, it was determined that this case was required to be heard and determined by a three-judge court (A. 41). By a memorandum opinion dated September 3, 1970, signed by all three judges, the court found that the regulations in question were unconstitutional and enjoined Regents from enforcing them (A. 164). The judgment signed by the single judge recites that this case was heard by a three-judge court and that the judgment was being entered in accordance with that court's opinion of September 3, 1970 (A. 176). Under these circumstances, *Dohany v. Rogers,* 281 U.S. 362 (1929), is dispositive of the question of whether the judgment signed by a single judge is the judgment of a three-judge district court. In *Dohany* the Court held that where the record showed that the case was heard by a three-judge district court as required by 28 U.S.C. §2281, a judgment signed by only one of those judges was nonetheless the judgment of the three-judge court because the judgment, ". . . on its face purports to be by the district court sitting in the cause . . . ." and ". . . there is ample authorization and sanction for the decree in the opinion signed by two of the judges and the concurring opinion of the third." Id., at 369-370. Under similar circumstances Mr. Justice Harlan, sitting as Circuit Justice, came to the same conclusion in *Breswick & Co. v. United States,* 100 L.Ed. 1510, 1515 (1955). See also *Cumberland T. & T. Co. v. Louisiana Pub. Serv. Comm.,* 260 U.S. 212, 218 (1922); cf. *Ayshire Collieries Corp. v. United States,* 331 U.S. 132, 138 (1946). The judgment in this case falls within that rule.

This is not a case like *Mengelkoch v. Industrial Welfare Comm.,* 393 U.S. 83 (1968), and *Wilson v. City of Port Lavaca,* 391 U.S. 352 (1968), where the judgment of the single judge was entered after the three-

judge court had determined that the case was not required to be heard by such a court.

Aside from the fact that the record in this case presents a judgment which falls within the rule of *Dohany,* the memorandum opinion of the three-judge court in this case (A. 164), signed by all three judges on September 3, 1970, contains the following recitation, (A. 173):

> "It is therefore ADJUDGED that Sections 6.11 and 6.12 of the Regents Rules and Regulations are unconstitutional; it is further ORDERED that the Regents are hereby ENJOINED from enforcing either section."

This language is sufficient to constitute a judgment of the three-judge court for purposes of appeal. See *United States v. Schaefer Brewing Co.,* 356 U.S. 227 (1958); *Burns v. Ohio,* 360 U.S. 252 (1959); *United States v. Hark,* 320 U.S. 531 (1943). Considering it as such, the procedural steps taken by Regents present a timely appeal. Surely it would serve no useful purpose, either as a matter of procedure or for the ends of justice, to send this case back to the three-judge district court in order for two judges of that court to perform the perfunctory task of affixing their signatures to a judgment that clearly reflects that it is in accordance with the opinion signed by all members of the court.

Passing now to the question of whether this case is one that was required by Act of Congress to be "heard and determined by a district court of three judges." The Plaintiffs below brought this action for the purpose of obtaining an injunction prohibiting the Regents from enforcing certain of its rules and regulations upon the ground that such rules and regulations unconstitutionally impinge upon First Amendment

rights (A. 9, 29-30). Regents contend that the provisions of 28 U.S.C. §2281 required this case to be heard and determined by a three-judge district court. That section reads as follows:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

The Board of Regents of The University of Texas System was created by the Legislature as the governing body of The University. Articles 2584, 2584a, Vernon's Civil Statutes. It is a state board and its members are "officers of the state." *Splawn v. Woddard,* 287 S.W. 677 (Tex.Civ.App. 1926, no writ). Article 2585, Vernon's Texas Civil Statutes, imposes upon the Regents the duty to ". . . enact such by-laws, rules and regulations as may be necessary for the successful management and government of the University; . . ." The rules and regulations of the Regents are of the same force and effect as statutes duly enacted by the Legislature. *Foley v. Benedict,* 122 Tex. 193, 55 S.W.2d 805 (1932). The rules and regulations of the Regents are not statutes that are merely local in nature, as was the case in *Moody v. Flowers,* 387 U.S. 97 (1967), and *Rorich v. Board of Com'rs of Everglades Drainage Dist.,* 307 U.S. 208 (1939); to the contrary, they extend to numerous campuses, schools and facilities located throughout the State of Texas. See e.g.: Articles 2585c, 2585d, 2603e, 2603f-1, 2603f-2, 2603f-3, 2603i, 2606b,

2606c, 2606c-1, 2606c-1.1, 2606c-2, 2606c-2.1, 2606c-3, 2606c-3.1, 2606c-4, 2606d, 2620a, 2633, Vernon's Texas Civil Statutes. They are clearly statewide in character and application. Therefore, whether we accept the decisions of the Texas courts holding the Regents to be "officers of the state" and equating their rules and regulations with "legislative enactments," or merely view the rules and regulations as *orders* and the Regents as *an administrative board or commission acting under State statutes,* 28 U.S.C. §2281 requires that a request for an injunction restraining the Regents in the execution of their rules and regulations be heard and determined by a three-judge district court. *Phillips v. United States,* 312 U.S. 246 (1941); *Sailors v. Kent Board of Education,* 387 U.S. 105 (1967); *Sigma Chi Fraternity v. Regents of University of Colorado,* 258 F.Supp. 515 (D.C. Colo. 1966); *Clarke v. Redeker,* 259 F.Supp. 117 (S.D. Iowa 1966); *Webb v. State University of New York,* 125 F.Supp. 910 (N.D. N.Y. 1954); *Stacy v. Williams,* 306 F.Supp. 963 (N.D. Minn., 1969); *Gilmore v. Lynch,* 400 F.2d 228 (9th Cir. 1968); *Williams v. McNair,* 316 F.Supp. 134 (D.C. S.C. 1970); *Sellers v. Regents of University of California,* 432 F.2d 493 (9th Cir. 1970).

This Court has jurisdiction to review the judgment in this case under 28 U.S.C. §1253.

REGULATION INVOLVED

Acting pursuant to the powers conferred by Article 2585, Vernon's Texas Civil Statutes, the Regents from time to time have promulgated and enforced rules and regulations for the government of The University of Texas System. These rules and regulations have the force and effect of legislative enactments. *Foley v. Benedict,* 122 Tex. 193, 55 S.W.2d 805 (1932). The regulation in question is designated as *Section 6.11, Chap-*

ter VI, Part 1, Rules and Regulations of the Board of Regents of The University of Texas System. It reads as follows:

"6.11 Commercial solicitations will not be authorized on the campus of any component institution of The University of Texas System, except as otherwise provided in this section. Commercial solicitations include the sale, contract of sale, advertisement or promotion for sale, disposition of or contract to dispose of any item of personal property; the inducement of any person, group, or organization to contract with regard to any item of personal property, service, or anything that the offerer may offer; or the solicitation of funds or personal property. The following commercial solicitations are permissible:

(1) commercial solicitations in a Student Union Building that have been approved by the Board of Directors or by the appropriate union governing body subject to applicable institutional rules and regulations and applicable Regents' Rules and Regulations;

(2) the sale of any authorized student publication or any publication authorized by an agency of a component institution;

(3) any commercial solicitation made pursuant to a contract or agreement between the administration of a component institution and the vendor;

(4) the sale of any newspaper or other publication by means of a vending machine located in a campus building, if a certain area or areas within a campus building have been designated in advance by the institutional head or his representative as appropriate for such sales; and

(5) any commercial solicitation necessary for the normal administration, operation, and

maintenance of any component institution is an educational institution."

QUESTIONS PRESENTED

1. A part of the federal class Plaintiffs were Defendants in a state court action brought by the Regents to enforce their solicitation Rules 6.11 and 6.12 at the time this class action was filed in the court below. If that part of the federal class Plaintiffs raise and litigate the constitutionality of those rules in the state court, is the state court judgment binding upon the other federal court class Plaintiffs when plead by the Regents as a bar in the court below?

2. In view of the pending state court action, was the judgment of the court below precluded by either 28 U.S.C. §2283 or the absence of facts showing that Plaintiffs in the court below would suffer great and immediate irreparable injury as a result of the Regents' action to enforce its rules in state court?

3. Whether Section 6.11 of the Regents' Rules imposes an impermissible burden upon the right of free speech and association secured by the First Amendment when applied to property owned by the State and dedicated to educational purposes?

STATEMENT

The Regents brought an action in the 167th District Court of Travis County, Texas, to enjoin New Left Education Project, Radical Media Project, Clyde Alan Locklear, Nancy Sweeny, James Caldwell, Patricia Cuney, David Waddington, Larry Neil Winn and other persons of a class, from selling or distributing for consideration or otherwise a newspaper known as "The Rag" and from making any other commercial or noncommercial solicitation on the campus of The University of Texas at Austin, except in compliance

with Section 6.11 and 6.12 of the Regents' Rules. Thereafter, the Defendants in the state court action filed this action against the Regents in the United States District Court, Western District of Texas (A. 1). The Complaint (A. 3) set forth the fact that the federal Plaintiffs were Defendants in the pending state court action (A. 3,4,5,7); it alleged that federal Plaintiffs brought the action individually and on behalf of a class under Rule 23, F.R.C.P. (A. 4); it alleged that the solicitation rules which Regents sought to enforce impinged upon the First Amendment rights of federal Plaintiffs and the class they represent (A. 4,6,7,9); it requested declaratory judgment that the rules in question are unconstitutional, and asked for injunction restraining Regents from further attempting to enforce the rules in question, either by disciplinary proceedings or "by maintenance of state court injunctive action" (A. 9). Regents' Answer to the federal action denied the material allegations concerning the constitutionality of the rules; it alleged that the federal court was prohibited by 28 U.S.C. §2283 from granting the requested injunctive relief and that declaratory relief should be denied because all of the issues raised could be litigated in the pending state court action (A. 10).

Federal Plaintiffs then filed a Motion for Leave to Amend (A. 20) which was opposed by Regents (A. 33). The Amended Complaint (A.22) joined as parties Plaintiff The Young Democratic Club, Emma Leigh Washburn, Janis Buchanan, Carl Roberts, James R. Waddington, Seth B. Cox, Emily Calhoun, Richard Streeter, Marilyn Turboff, Paula Beaird, Robert Claymay, Lyssa Clayman and Barbara Hines, still alleging that Plaintiffs were representative of a class and requesting the same relief as the Original Complaint.

By an order dated December 17, 1969, (A. 41) the three-judge court granted leave to amend and granted joinder of the parties Plaintiff under Rule 20(a), F. R.C.P., on the finding that the claims of all parties Plaintiff present common questions of law and fact and arise out of the same series of occurrences. That order further recites that the claims of the original federal Plaintiffs and the Plaintiffs joined by the Amended Complaint present *different procedural issues* and severs the class into two categories: "Part A" consisting of the federal Plaintiffs who are state court Defendants and "Part B" consisting of the remainder of the federal Plaintiffs. The court then proceeded to express its faith in the ability of the state court to resolve the constitutional issues relating to the validity of Regents' Rules 6.11 and 6.12; declined the "Part A" Plaintiffs' request for injunctive relief against the state court action and their request for declaratory judgment as to the constitutionality of Regents' Rules 6.11 and 6.12 and dismissed the "Part A" portion of the Amended Complaint. The order of the court then declared that the "Part B" Plaintiffs would be allowed to challenge the constitutionality of Regents' Rules 6.11 and 6.12 and that their request for declaratory and injunctive relief would be considered in further proceedings before the court.

On January 8, 1970, the Young Socialist Alliance filed a Motion to Intervene as Party Plaintiff in the court below (A. 44), alleging that it was a member of the class of Plaintiffs described in the First Amended Complaint and adopting all material allegations and prayers of that Complaint. By its order of February 10, 1970, the court below granted the Young Socialist Alliance leave to intervene (A. 48).

The state court action came on to be heard upon the

Regents' application for temporary injunction on the 25th day of February, 1970. The state court Defendants ("Part A" Plaintiffs in the federal court) appeared by and through the same counsel who represented all Plaintiffs in the federal court action, presented evidence and argued to the state court their contention that Regents' Rules 6.11 and 6.12 violated their First Amendment rights (A. 78-79). The constitutional issues were fully raised by the pleadings of the state court Defendants (A. 85, 115). On February 26, 1970, the state court entered its judgment (A. 80, 110) finding Regents' Rules 6.11 and 6.12 to be reasonable regulation of conduct on campus; finding that they do not abridge First Amendment rights; and granting a temporary injunction restraining the state court Defendants and all persons acting in concert with them from selling "The Rag" in violation of said rules.

The "Part B" federal court Plaintiffs then filed a Motion for Summary Judgment (A. 56) in the court below on March 10, 1970. Regents filed several Affidavits in Opposition to Motion for Summary Judgment (A. 73,76,78,152,157,158). Regents also filed a Second Amended Answer (A. 100) to bring forward its contentions with regard to 28 U.S.C. §2283 and the propriety of declaratory relief, denying the material allegations of the Amended Complaint, specifically pleading the fact of the state court judgment and its effect as res judicata and bar upon the issues and parties before the federal court (A. 105-108). Certified copies of the state court pleadings and judgment were attached to the Regents' Second Amended Complaint (A. 109-130) and to the Affidavit of Regents' attorney (A. 78-99). The state court judgment was also made the basis of a Motion to Dismiss filed by the Regents (A. 146).

On June 26, 1970, the "Part B" federal court Plaintiffs' Motion for Summary Judgment and the Regents' Motion to Dismiss came on to be heard before the court below. The following facts were before that court by way of stipulation, interrogatory and affidavit.

The campus at The University of Texas at Austin covers approximately 262 acres. More than 36,000 students are enrolled at this component institution of the System and over 7,000 persons are employed on the campus (A. 152, 162).

A free speech area of approximately 17,000 square feet is maintained on the Austin campus immediately adjacent to the student union building where persons may make speeches and hold demonstrations without prior administrative approval (A. 158, 162).

The Federal Plaintiffs make no contention that the Regents' Rules 6.11 and 6.12 have been applied or enforced in a discriminatory manner (A. 163).

From time to time there are as many as fifteen booths located on the west mall of the Austin campus for purposes of distributing literature in conformity with University rules (A. 160). During the period from January through March, 1970, those booths were authorized and maintained for the various purposes shown in the answers to interrogatories No. 7 and No. 8 (A. 137-139) in conformity with the institutional rules then in effect on the Austin campus as set forth in the Appendix at 142-145. Also various signs were posted on the campus. The purpose of the signs and the student organization posting them are listed (A. 140-141) in response to Plaintiffs' interrogatory No. 9. All were authorized under institutional rules then in effect on the campus at Austin, subject to Regents'

Rules 6.11 and 6.12, as indicated by footnoting in the institutional rules (A. 142-145).

In conformity with Regents' Rule 6.11(2), student publications printed by Texas Student Publications, Inc., an agency of The University of Texas at Austin and subject to the ultimate control of the Regents (A. 154), are sold and distributed on the Austin campus. Those that are sold or distributed from booths or stands are as follows:

1. *Daily Texan*—the Austin campus newspaper. Distributed from unattended stands at the entrances to nine buildings located on the campus (A. 131, 160).

2. *The Riata*—a literary magazine containing writings and art contributed by students in those fields. Sold from four booths (one on each side of the campus), twice a year for one day (A. 131, 161).

3. *Student Directory*—a listing of the names, addresses and telephone numbers of the student body at Austin. Sold once a year from booths at the same locations as *The Riata* (A. 131, 161).

Additional authorized student publications are: *Cactus*—the Austin campus yearbook; *Peregrinus*—the Austin campus law school yearbook; *Texas Engineering and Science Magazine*—carries articles on current engineering and science research and ideas; *Student Activities Handbook*—giving general information about The University (A. 131-132). No facts were developed as to how or when these publications are sold or distributed.

Also pursuant to Regents' Rule 6.11(2), the various colleges and departments at the Austin campus

sell educational pamphlets, journals and books dealing with the departmental subject (A. 132). These publications are not sold from booths upon the malls of the Austin campus, but are sold either through subscription or at the office of the particular college or department. They fall within the category of publications "authorized by an agency of a component institution" (A. 132, 154).

Commercial sales permitted pursuant to Regents' Rule 6.11(3) consist of vending machines which dispense food and drinks, placed in designated places in the campus buildings; coin operated washing machines and dryers in the various dormitories; and food and drinks provided at athletic contests (A. 155). Also other sales of a similar nature listed in response to Plaintiffs' interrogatory No. 3 (A. 132-134).

Pursuant to Regents' Rule 6.11(4), the sale of newspapers and other publications by vending machine is permitted in five accessible and separated areas on the Austin campus, as listed (A. 134) in response to Plaintiffs' interrogatory No. 4 (A. 71). At least 12 newspapers, including "The Rag" at one location, are sold at these designated areas (A. 132). The Young Socialist Alliance has never asked for permission to sell literature or publications at these locations (A. 162). Any newspaper or publication is entitled to be sold from vending machines at these locations upon applying to the appropriate administrative official (A. 155).

Sales of various toiletries, athletic equipment, educational material, laboratory equipment, workbooks, school supplies, office stationery, prepared food, and articles normally consumed in the course of academic work are sold by The University at appropriate places

pursuant to Regents' Rule 6.11(5). (A. 134-135; A. 155-156).

The rationale for the five categories of commercial solocitation excepted from the general application of Regents' Rule 6.11 is that they are of sufficient importance and service to the students and faculty as to be permitted (A. 156).

Sandra Gay Ellis, a student at The University of Texas at Austin, testified by affidavit that the manner in which persons selling "The Rag" on the Austin campus conducted their solicitations was extremely irritating to her and that the commercial solicitation rule served the purpose of keeping students on campus from being bothered by obnoxious solicitors (A. 76).

Frank C. Erwin, Jr., Chairman of the Board of Regents, testified by affidavit that he had received complaints from persons who were offended by the solicitation tactics of persons selling "The Rag" (A. 153).

Jack Holland, Assistant Vice-Chancellor for Student Affairs (former Assistant Dean of Men, Dean of Men, and Dean of Students at the Austin campus) testified by affidavit that he had received complaints from faculty, students and employees who had been approached on the Austin campus by persons selling magazines, newspapers, or encyclopedias and had been annoyed by such persons (A. 157).

Edwin B. Price, Assistant Dean of Students at The University of Texas at Austin, testified by affidavit that laboratory instructors had reported to him that persons soliciting the sale of newspapers and magazines in the laboratories and laboratory buildings were disrupting laboratory classes. He also received complaints from professors who said that their classes were disrupted because students were reading pam-

phlets and circulars that had been left in the classrooms for the purpose of soliciting subscriptions to magazines. He further testified that he had received reports that newspaper and magazine salesmen were annoying residents of dormitories located on the Austin campus (A. 158). He also testified that the malls of the campus at Austin have not been maintained or used as traditional free speech areas, but that a free speech area was maintained adjacent to the student union building (A. 149).

At the conclusion of the hearing before the court below on June 26, 1970, the court took the matters presented under consideration and on September 3, 1970, rendered a memorandum opinion (A. 164-175). The court concluded that the state court judgment was not res judicata as to the constitutionality of Regents' Rules 6.11 and 6.12, and proceeded to find that although the Regents interest in preventing substantial disorder or material disruption of classroom activity was a "compelling" state interest which would justify "*some reasonable regulation,*" nonetheless the questioned rules "broadly stifle fundamental personal liberties when the end can be more narrowly achieved" and are therefore "unconstitutionally overbroad" (A. 170-171). The court further found that both rules are invalid because they "vest standardless discretion in the institutional head or his agency-delegate to grant or withhold exercise of first amendment rights" (A. 173). Judgment was entered enjoining the Regents, their agents, servants, employees, attorneys and all other persons in active concert or participation with them from further enforcement of such rules (A. 177).

SUMMARY OF ARGUMENT

I.

Upon the basis of their own allegations and argu-

ments, the court below found that "Part A" and "Part B" Plantiffs to that cause were members of a class whose challenge to the constitutionality of Regents' solicitation rules present common questions of law and fact arising out of the same series of occurrences. If "Part B" Plaintiffs had not been allowed to join in this action, it is clear that once "Part A" Plaintiffs had freely and unreservedly litigated the constitutionality of the Regents' Rules in the state court action they could not return to federal court to relitigate those same issues. *England v. Louisiana Medical Examiners,* 375 U.S. 411 (1964). Reason dictates that because of the avowed sameness of "Part A" and "Part B" Plaintiffs' interest in all questions of law and fact, "Part B" Plaintiffs were also precluded from relitigating in the court below those issues decided by the state court. To conclude otherwise would clearly circumvent the principles and reasoning expressed in *England* by allowing "Part A" to return to federal court in the guise of "Part B" to relitigate the same issues.

II.

While ordinarily a temporary injunction may not be the basis of a plea of res judicata or bar, under Texas court decisions a temporary injunction can be final for purposes of res judicata where the ultimate issues forming the basis of the action or defense are put in issue and decided by the court. *Wilson v. Abilene Indp. Sch. Dist.,* 204 S.W.2d 407 (Tex.Civ.App. 1947, error ref. n.r.e.). "Part A" and "Part B" Plaintiffs being part and parcel of the same class, with no conflicting interest and presenting the same challenge to the Regents' Rules through a common counsel, all were bound by the state court judgment on the constitutional issues relating to Regents' Rules 6.11 and 6.12,

Hansberry v. Lee, 311 U.S. 32 (1940); *Gart v. Cole,* 263 F.2d 244 (2nd Cir. 1959). The court below was required by the full-faith-and-credit clause to give the state court judgment the same res judicata effect that it was entitled to in state court. *Oklahoma Packing Co. v. Oklahoma G. & E. Co.,* 309 U.S. 4 (1939).

III.

The provisions of 28 U.S.C. §2283 prohibit a federal court from granting an injunction to stay state court proceedings. Although the injunction entered by the court below was directed to the Regents, their agents and counsel, it effectively prohibited ther from taking any steps in the state court to either make the temporary injunction permanent or enforce the temporary injunctiou. This brought it within the prohibition of § 2283. *Atlantic Coast Line R. Co. v. Engineers,* 398 U.S. 281 (1970). Unless a case comes within one of the stated exceptions in §2283, state court proceedings must be allowed to proceed unimpaired by the lower federal courts, leaving the correction of any error up to the state appellate courts and the United States Supreme Court. The injunction entered by the court below does not come within any of the exceptions to §2283, and, being powerless to enlarge upon those exceptions, the injunction should not have been entered. *Atlantic Coast Line R. Co. v. Engineers, supra; Amalgamated Clothing Workers v. Richman Brothers,* 348 U.S. 511 (1954). Nor can the Declaratory Judgment Act be used as a vehicle to circumvent the prohibition of §2283 by the court granting such a judgment and then entering an injunction to "protect or effectuate" the declaratory judgment under §2283. *Samuels v. Mackell,* 400 U.S. —, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971). Consequently, that relief was also unauthorized.

IV.

On the basis that comity and the principles of "Our Federalism" require respect for the proposition that our system will fare best if state courts are left free to perform their functions, this Court has held that wholly aside from the prohibition of 28 U.S.C. §2283, a federal court is not authorized to grant an injunction to stay a state court criminal prosecution or grant a declaratory injunction holding the statute under which that prosecution is proceeding unconstitutional except upon a showing that both great and immediate irreparable injury will occur as a result of the prosecution. *Younger v. Harris,* 400 U.S. —, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971); *Samuels v. Mackell,* 400 U.S. —, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971); *Perez v. Ledesma,* 400 U.S. —, 91 S.Ct. 674, 27 L.Ed.2d 701 (1971). The mere fact that the statute under which the prosecution is brought has a "chilling effect" upon First Amendment rights or may be unconstitutional upon its face is not sufficient to warrant interference with the state action taken under it. In the absence of bad faith prosecution or harrassment, it must be shown that one's federally protected right cannot be vindicated by the defense of a single criminal prosecution. *Younger v. Harris, supra.* There is no reason in logic or law why these same principles should not apply to the power of a federal court to grant injunctive or declaratory relief where the pending state court action is a civil suit to enforce the provisions of a state statute or regulation. Since the Plaintiffs in the court below failed to present facts which would satisfy the foregoing criteria, the court below was unauthorized to grant injunctive and declaratory relief which interfered with the pending state court action.

V.

Since the campus at Austin, and other institutions under the control of Regents, is dedicated to use for educational purposes, Regents are authorized to enact reasonable rules and regulations necessary to preserve the use of its property for that purpose. *Adderly v. Florida,* 385 U.S. 39 (1967); *Tinker v. Des Moines Community School Dist.,* 393 U.S. 503 (1969). Conduct which is mixed with elements of free speech may be regulated as to time, manner and place in order to further an important governmental interest if the regulation is unrelated to suppression of free expression, and the restriction on those freedoms is incidental. Because past and continuing experience showed that unrestricted solicitation of the sale of newspapers and magazines upon the Austin campus disrupted the routine of classrooms and laboratories, resulted in the anoyance of students, faculty and employees both on campus malls and in dormitories, restricting sales of such publications from vending machines located in specified areas of the campus in order to preserve the orderly and efficient operation of the educational process is not an unconstitutional restriction of First Amendment freedoms. *Breard v. Alexandria,* 341 U.S. 622 (1950); *Kuszynski v. City of Oakland,* 322 F. Supp. 689 (N.D. Calif. 1971). Absent any showing that the method selected or the areas designated for such solicitations were calculated to suppress free speech or the free press, the decision of the Regents that these rights could in this mannr best be accommodated upon the campus without undue disruption or interference with the educational process should not be set aside. Discretion as to what is necessary and wise in such instances should rest with the school administrators trained and experienced in such matters, not the courts. *Waugh v. Board of Trustees,* 237 U.S. 589 (1914).

Upon the foregoing principles Regents' Rule 6.11 is constitutional.

ARGUMENT

I. Plaintiffs And The Class They Represent.

Regents' contentions regarding the status and relationship of the Plaintiffs in the court below and the Defendants in the state court is relevant to all sections of their brief except the section on the merits and for this reason it is set forth as an initial section in an effort to avoid repetition.

The original Plaintiffs to this action were identical to the Defendants in the prior pending state court action. Upon allowing the filing of Plaintiffs' Amended Complaint and the joinder of additional parties Plaintiff, the court below divided the Plaintiffs into two groups, i.e., "Part A" and "Part B." It is Regents' contention that "Part A" Plaintiffs and "Part B" Plaintiffs each stood for the other in the respective phases of this litigation, and that together, by their own admission, they are members of a class which they represented. This is clearly demonstrated by resort to the pleadings and the order of the court below entered on December 17, 1969.[1] The First Amended Complaint is replete with the assertions of a class

[1]See Plaintiffs' Memorandum In Support of Motion To Amend (A. 37-39) where it is argued by Plaintiffs' counsel that the amended pleading should be filed and the joinder was proper because "obviously the causes of action asserted by all Plaintiffs raise common questions of law, and undoubtedly of fact also, as to the constitutionality of the Regents' Rules [6.11, 6.12] limiting solicitations upon the campus." Plaintiffs' counsel also urged the court to allow the amendment and joinder "to prevent a multiplicity of suits, and expedite the final determination of litigation by inclusion in one suit of all parties directly interested in the controversy." As we can now see the amendment and joiner achieved the opposite results.

action such as: the action is brought to preserve the First Amendment freedoms of "plaintiffs and the class they represent"; that "plaintiffs sue on their own behalf, and on behalf of a class composed of all students at the University of Texas at Austin who share an interest in the full enjoyment of First Amendment rights"; that the maintenance of the state court action by Regents "abridges the First Amendment rights of the plaintiffs and the class they represent"; that the Regents' Rules infringe upon the First Amendment freedoms of all those associated with the University of Texas at Austin"; that "plaintiffs and the class they represent and the public are threatened with serious and irrevocable injury."

In allowing filing of the First Amended Complaint which brought in the Plaintiffs which the court denominated as "Part B," the court found that their joinder under Rule 20(a), F.R.P.C., was proper because the "claims of all parties plaintiff to plaintiffs' first amended complaint present common questions of law and fact and that they arise out of the same series of occurrences." (A. 41). The court went on to find "that the claims of the parties plaintiff present *different procedural issues*" (emphasis added) and proceeded to split them into the "Part A" and "Part B" groups, relegated "Part A" to the prior pending state court action and leaving "Part B" in the court below.[2] It is important to note that the court found no difference in the *substantive issues* presented by the Plaintiffs, only procedural differences. Apparently the division of the class Plaintiffs into two groups was an *ad hoc* attempt by the court to resolve what it perceived

[2]The Young Socialist Alliance was allowed to later join "Part B" upon the assertion that they were a part of the class described in the Plaintiffs' First Amended Complaint and that they adopted all allegations thereof (A. 44-45, 48).

to be a dilemma created by the pending state court action. It would have better served the ends of orderly judicial processes and the purposes of the dual legal system embodied in the concept of federalism under which this country was established, if the court had merely required the members of the class who sought joinder by the amended complaint to follow their "Part A" brethren to the state court and intervene in that pending action,[5] since they presented no substantive issues different from "Part A" Plaintiffs. Instead, by its order of December 17, 1969, the court below created an unseemly anomaly by splitting an admitted class of Plaintiffs into two groups and leaving them to present claims involving the same questions of law and fact, arising out of the same occurrences, to two different courts—one a state court, the other a federal district court.[6]

II. Res Judicata.

Although the principles laid down by this Court in *England v. Louisiana Medical Examiners,* 375 U.S. 411 (1964), may not technically fall within the category of res judicata, the Regents' contentions with respect to the application of *England* to the case at hand are sufficiently related so as to be presented under this section of their brief. It was considered as a part of Regents' res judicata contentions in the opinion of the court below.

In *England v. Louisiana Medical Examiners,* 375 U.S. 411 (1964), a group of chiropractors brought an action in federal district court seeking an injunction

[5]Under Rule 60, Texas Rules of Civil Procedure, they had a right to intervene, subject only to being stricken by order of the state court.

[6]The court below finally realized the existence of this anomaly and questioned whether it had made a mistake (T. 17).

and a declaration that, as applied to them, the Louisiana Medical Practice Act violated the Fourteenth Amendment. Invoking the doctrine of abstention, on the theory that a determination by the state courts that chiropractors are not governed by the act would end the controversy, the federal district court stayed further proceedings to afford the state courts an opportunity to pass upon such issues. The federal Plaintiffs then brought proceedings in the state court and, rather than restricting those proceedings to the question of application of the Act, they unreservedly submitted for the decision of the state court, and briefed and argued, their contention that if the Act governed chiropractors it violated the Fourteenth Amendment. The Louisiana Supreme Court refused to review the lower state court decision that the Act applied to chiropractors and did not violate the Fourteenth Amendment. The chiropractors then returned to the federal district court, where the Medical Board moved to dismiss. The district court granted this motion, stating:

> ". . . since the courts of Louisiana have passed on all issues raised, including the claims of deprivation under the Federal Constitution, this court, having no power to review those proceedings, must dismiss the complaint. The proper remedy was by appeal to the Supreme Court of the United States." 194 F.Supp. at 522.

On review by this Court is was held that:

> ". . . if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then—whether or not he seeks direct review in this Court—he has elected to forego his right to return to the District Court." 375 U.S. at 419.

The Court reasoned that a party unreservedly litigating his federal claims in state court should not be

allowed to ignore an adverse decision and begin anew in federal court. If he wishes to preserve his federal claims for later determination, he must make a reservation of those claims on the state court record by informing the state court that he intends to return to federal court for a determination of his federal claims.

Although the original Plaintiffs in the present case [who were designated as "Part A" by the court below] were remanded to the state court because of the restriction imposed upon the injunctive powers of the court below by 28 U.S.C. §2283 rather than under the doctrine of absention, we see no logical reason for saying that the principles laid down by this Court in *England* would not have precluded "Part A" Plaintiffs from returning to federal district court. They unreservedly plead, argued and presented for the decision of the state court their First Amendment contentions concerning the constitutionality of Regents' Rules 6.11 and 6.12; they made no reservation of the constitutional issues upon the record in the state court.* It is submitted that "Part A" Plaintiffs could not, under *England,* have returned to the court below to litigate those issues, but that they did in fact return in guise of the "Part B" Plaintiffs to relitigate those same issues.

Of course, if the "Part A" members of the class had successfully pressed their First Amendment attack upon the Regents' Rules in the state court action, there would have been no occasion for the "Part B" class members to implore the court below to pass upon the same issues. Now, as a result of the refusal of the court below to apply the *England* principles to the

*The "Part A" and "Part B" Plaintiffs have been represented by the same counsel throughout all phases of the litigation in both courts.

situation before it, all that *England* was intended to prevent has come to fruition in this case. Regents' Motion to Dismiss should have been granted on the basis of *England.*

The judgment of the state court upon the issue of the constitutionality of Regents' Rules 6.11 and 6.12 was specifically plead by the Regents in the court below as being res judicata or an estoppel to the relitigation of those issues in the federal court. Regents theory in the application of these principles is dependent upon its contention that "Part A" Plaintiffs and "Part B" Plaintiffs are, as they themselves alleged and argued in the court below, members of the same class.

It is familiar doctrine of the federal courts that a judgment in an action to which some members of a class are parties is binding upon the other members of the class who were not parties if their interests are the same, and it can fairly be said that the class members who were parties adequately represented the absent membrs of the class in presenting the issus in which all of the class had a common interest. *Hansberry v. Lee,* 311 U.S. 32 (1940); *Montezuma Canal Co. v. Smithville Canal Co.,* 218 U.S. 371 (1910); *Schatte v. International Alliance,* 84 F.Supp. 669 (S. D. Calif. 1949), aff'd 182 F.2d 158 (9th Cir. 1950), cert.den. 340 U.S. 827; *Jefferson School of Social Science v. Subversive Activities Control Board,* 331 F.2d 76 (D.C. Cir. 1963); *McIntosh v. City of Pittsburg,* 112 Fed. 705 (Cir.Ct. W.D. Penn. 1901); see *Stout v. Lye,* 103 U.S. 66 (1881).

Gart v. Cole, 263 F.2d 244 (2nd Cir. 1959), is particularly apposite. There a state court judgment was held to bar the relitigation of the same issues in

federal court even though the federal plaintiffs had not been parties to the state court action. The federal court was compelled to give the state court judgment this effect because the federal Plaintiffs were members of the class represented in the state action; they had ample notice of the action; the parties in state court had no interest contrary to the federal plaintiffs; and the same counsel that represented the state court parties represented the federal plaintiffs.

Regents submit that the facts of this case present all the elements necessary for the application of the principles set forth in the foregoing authorities. Yet the court below decided that it was not required to follow those precedents for two reasons.

First, it was noted by the court below that the judgment of the state court merely granted a temporary injunction and therefore could not be the basis of res judicata, citing *Miers v. Brouse,* 153 Tex. 54, 271 S.W. 2d 419 (1954). But, the court below ignored the Texas court authorities which clearly hold that a temporary injunction judgment can be final for purposes res judicata where the ultimate and controlling issues forming the basis of the action or defense are put in issue and passed upon by the court in its judgment granting temporary injunction.* *Wilson v. Abilene Ind. Sch. Dist.,* 204 S.W.2d 407 (Tex. Civ. App. 1947, error ref. n.r.e.); *Daniel v. Kittrell,* 188 S.W.2d 871 (Tex. Civ. App. 1944, no writ); see: *Hayden v. City of Houston,* 305 S.W.2d 798 (Tex.Civ.App. 1958, error

*This is not to say that having failed to appeal the temporary injunction judgment, the appellees can never have the issues decided by the trial court reviewed by the Texas appellate courts. The temporary injunction judgment may still be reviewed by filing a motion to dissolve in the trial court and appealing the action taken on their motion pursuant to Rule 385, Texas Rules of Civil Procedure, and Article 4662, Vernon's Texas Civil Statutes.

ref. n.r.e.); *Furr's, Inc. v. United Specialty Advertising Co.*, 385 S.W.2d 456 (Tex.Civ.App. 1964, error ref. n.r.e.). In citing these cases as controlling upon the issue of the res judicata effect of the judgment entered by the state court, Regents would point out that *Miers v. Brouse,* 153 Tex. 54, 271 S.W.2d 419 (1954), states the general rule concerning the res judicata effect of temporary injunctions, but the cases cited above establish the exception to the general rule. Resort to the opinion of the Court of Civil Appeals in *Miers v. Brouse* (reported at 261 S.W.2d 734) shows that the ultimate and controlling issue in that case concerned the ownership of a fund of money. Ownership of the fund was not presented to or decided by the court on the temporary injunction hearing—the court merely enjoined the party in possession of the fund from disposing of it pending determination of the ultimate issue of ownership. The statement in *Miers v. Brouse* is inapposite. Therefore, the court below was required to give the judgment of the state court the same res judicata effect that it was entitled to in the courts of the State of Texas. *Oklahoma Packing Co. v. Oklahoma G. & E. Co.,* 309 U.S. 4 (1939); *Caterpillar Tractor Co. v. International Harvester Co.,* 120 F.2d 82 (3rd Cir. 1941).

The principle of giving res judicata effect to temporary injunction judgments is not foreign to the federal court system.

> "We are committed to the rule that for the purpose of the doctrine of res judicata an interlocutory decree, affirmed on appeal, 'which in fact finally determines the issues presented by the pleadings and settles the controversies over the subject-matter involved, is sufficiently final to determine other litigation between the same parties respecting the same issues, regardless of the fact that it may be

> in legal nomenclature termed an interlocutory decree, . . .' and 'Final' as used by the courts when dealing with the subject of res judicata, is not to be determined by adjective terms."

Sewerage Commission v. Activated Sludge, Inc., 81 F.2d 22 (7th Cir. 1936), at page 23. The effect of a judgment as res judicata is not affected by the fact that an available appeal of the judgment was not taken. *United States v. Munsingwear*, 340 U.S. 36 (1950).

Secondly, the court below rationalized that the class in the state court was never any larger than those associated in distributing "The Rag," while the larger federal court class was never in the state court and therefore could never be bound by that judgment. In reaching this conclusion the court below closed its eyes to every pleading, every brief, every order and every legal precedent before it. Both the state court and the federal court, and everyone before them, knew that "Part A" Plaintiffs and "Part B" Plaintiffs were part and parcel of the same class; that their interests in challenging the Regents' Rules were identical; that the issues presented by them to the two courts were the same. The very order which created the two portions of the class belies the contention that they were not members of the same class or that they were not each representative of the other in the two courts. They were not given their alphabetical designation because of any substantive or factual difference in their claims, but because of some yet undisclosed procedural difference perceived by the court below.

It would seem certain that had the court below rendered its judgment first and had concluded that Regents' Rules 6.11 and 6.12 did not abridge First Amendment rights, that judgment would have been binding on "Part A," "Part B" and every member of the class

they represented. Having been joined together by order of the court pursuant to Rule 20(a), F.R.C.P., and never having been separated for substantive purposes, all would be bound by such a judgment. *Snyder v. Harris,* 394 U.S. 332 (1969). Further, having plead and tried their claim under Rule 23, F.R.C.P., as a class action, "Part A" and "Part B" admittedly being part of the class, it is clear that the judgment would bind all members of the class except those who had asked to be excluded. Wright, *Law of Federal Courts,* 2nd Edition, §72, p. 311, 314. This would be true even though the members of the class are linked only by common questions of law and fact. Id., at 315.

"Part A" and "Part B" were never declared to be two separate classes, merely groups within the same class. Under the cited decisions and the facts, the court below was required by the full-faith-and-credit clause to give the state court judgment effect as a bar to the relitigation by "Part B" of the issues decided by that judgment, *American Surety Co. v. Baldwin,* 287 U.S. 156 (1932); *Magnolia Petroleum Co. v. Hunt,* 320 U.S. 430 (1943), and dismiss the action.

III. *The Judgment Was Prohibited by 28 U.S.C. §2283 and Is Unsupported by Facts Warranting Equitable Relief.*

The policy which prohibits a federal court granting an injunction to stay proceedings in state court has its origins in a statute enacted by Congress in 1793. It is presently embodied in 28 U.S.C. §2283 which reads as follows:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

The Plaintiffs' First Amended Complaint specifically recites the fact of the pending state court action to enforce the provisions of Regents' Rules 6.11 and 6.12; it prays for a declaratory judgment that such rules violate Plaintiffs' First Amendment rights and for an injunction restraining the Regents "and those acting under its direction and control, from further attempts to enforce the . . . rules and regulations, either by maintenance of state court injunctive action, disciplinary proceedings or in any other improper manner." (A. 29-30). The judgment entered by the court below permanently enjoins "Defendant Board of Regents of the University of Texas System, and all of the Defendant's agents, servants, employees and attorneys and all other persons in active concert or participation with them from further enforcement against the Plaintiffs of Article 6.11 and Article 6.12 of the Rules and Regulations of the Board of Regents of the University of Texas System." (A. 177).

The fact that 28 U.S.C. §2283 prohibited the court below from entering any order which would have the effect of a stay of the state court proceedings was consistently brought to the attention of the court by the Regents' pleadings (A. 10, 49, 100).

Although the injunction entered is directed only at the Regents and those acting at their direction, there can be no doubt that it prohibits any steps to have the pending state court action set down for a hearing on the merits and the temporary injunction made permanent. It also prohibits any action by the Regents to have the state court enforce its temporary injunction. Therefore, its effect is *to stay proceedings in a state court.* It is well settled that 28 U.S.C. §2283 "cannot be evaded by addressing the order to the parties or prohibiting utilization of the results of a completed

proceeding." *Atlantic Coast Line R. Co. v. Engineers,* 398 U.S. 281, 90 S.Ct. 1739, 1743, 26 L.Ed.2d 234, 241 (1970); *Oklahoma Packing Co. v. Oklahoma G. & E. Co.,* 309 U.S. 4 (1940); *Hill v. Martin,* 296 U.S. 393 (1935).

Any contention that the anti-injunction statute is merely a technical rule, not binding on federal courts, or that in some circumstances state court proceedings may be enjoined other than under the justification of the three exceptions contained in §2283, has been squarely rejected by this Court.* This Court has twice stated: "This is not a statute conveying a broad general policy for appropriate ad hoc application. Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions." *Atlantic Coast Line R. Co. v. Engineers,* 398 U.S. 281, 90 S.Ct. 1739, 1743, 26 L.Ed.2d 234, 241 (1970); *Amalgamated Clothing Workers v. Richman Brothers,* 348 U.S. 511, 515-516 (1955). The federal courts are powerless to enlarge upon these exceptions.

> ". . . a federal court does not have inherent power to ignore the limitations of §2283 and to enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area pre-empted by federal law, even when the interference is unmistakably clear. This rule applies regardless of whether the federal court itself has jurisdiction over the controversy, or whether it is ousted from jurisdiction for the same reason that the state court is."

Atlantic Coast Line R. Co. v. Engineers, supra, 90 S. Ct. at 1747, 26 L.Ed.2d at 245. The reason for 28 U.S.C.

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*This Court has also engrafted an exception where a person about to be prosecuted under a state criminal statute can show that he will suffer irreparable damages if the state court proceeding is not enjoined. *Ex parte Young,* 209 U.S. 123 (1908).

§2283 is founded upon the "constitutional independence of the States and their courts," and proceedings before such courts "should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court." Id., 90 S.Ct. at 1743, 26 L.Ed.2d at 241. "The explicit wording of §2283 itself implies as much, and the fundamental principle of a dual system of courts leads inevitably to that conclusion." Id., 90 S.Ct. at 1748, 26 L.Ed.2d at 246. Even where an injunction against state proceedings would be proper under general equitable principles, it can only be sustained where it is based upon one of the three exceptions to §2283. Id., 90 S.Ct. at 1743, 26 L.Ed.2d at 241. The grant of limited jurisdiction to federal courts by Congress is evidence of faith in the ability of state courts to protect federal rights and 28 U.S.C. §2283 is an explicit Congressional expression of that faith. *Amalgamated Clothing Workers v. Richman Brothers,* 348 U.S. 511, 518 (1954).

The injunction of the court below does not purport to come within any of the exceptions to 28 U.S.C. §2283, therefore it falls within the plain interdiction of that statute and cannot be sustained. Any contention that the injunction of the lower court was authorized by §2283 because it was to "protect or effectuate its [declaratory] judgment" is precluded by the decision in *Samuels v. Mackell,* 400 U.S. —, 91 S.Ct. 764, 27 L. Ed. 2d 688 (1971). That case teaches us that in situations where an injunction would be improper under the settled principles of equity or because of policy limitations imposed upon such relief, declaratory judgment is also improper. One of the reasons advanced for this conclusion is the fact that the Declaratory Judg-

ment Act authorizes the district court to enforce judgments entered under that Act by granting "further necessary or proper relief." Consequently, in cases where 28 U.S.C. §2283 prohibits the issuance of an injunction to stay proceedings in a state court, "a declaratory judgment issued while state proceedings are pending might serve as a basis for a subsequent injunction against those proceedings to 'protect or effectuate' the declaratory judgment, 28 U.S.C. §2283, and thus result in a clearly improper interference with the state proceedings." Id., 91 S.Ct. at 767-768, 27 L.Ed.2d at 693. Although the state court proceeding in *Samuel v. Mackell* was a criminal prosecution, the holding of the Court is based squarely upon the rule announced in prior cases involving civil proceedings. Just as the Court could "perceive no relevant difference between the two situations" there, we see none here. And surely the same civil cases relied upon by the Court in *Samuels v. Mackell* require that the same principles be applied in the case at bar.

Wholly aside from the prohibition of 28 U.S.C. §2283, the record in this case does not present, by way of either allegation or proof, facts which would warrant the exercise of the equity powers of a federal court to grant either injunctive or declaratory relief against a state court proceeding to enforce Regents' Rules 6.11 and 6.12.

In a series of decisions handed down by this Court on February 23, 1971, the tendency of the federal district courts to grant injunctive relief against pending state court prosecutions with ever increasing frequency and latitude under the umbrella of *Dombrowski v. Pfister,* 380 U.S. 479 (1965), was sharply curtailed. On that date this Court pointed out in *Younger v. Harris,* 400 U.S. —, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971),

that the concept of "comity" and the principles of "Our Federalism" require respect for the "belief that the National Government will fare best if the States and their separate institutions are left free to perform their separate functions in their separate ways." Id., 91 S.Ct. at 750-751, 27 L.Ed. 2d at 675. Relying upon this premise the Court held that federal district courts are warranted in granting injunctive relief against pending state court criminal prosecutions only where it is shown that *both great and immediate irreparable injury* will occur as a result of the prosecution.

> "Certain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered 'irreparable' in the special sense of that term. Instead, the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense of a single criminal prosecution." Id., 91 S.Ct. at 751, 27 L.Ed.2d at 676-677.
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> "Moreover, the existence of a 'chilling effect,' even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action." Id., 91 S.Ct. at 754, 27 L.Ed.2d at 679.
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> "Just as the incidental 'chilling effect' of such statutes does not automatically render them unconstitutional, so the chilling effect that admittedly can result from the very existence of certain laws on the statute books does not in itself justify prohibiting the State from carrying out the important task of enforcing these laws against socially harmful conduct that the State believes in good faith to be punishable under its laws and constitution." Id., 91 S.Ct. at 754, 27 L.Ed.2d at 680.
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> ". . . the possible unconstitutionality of a statute 'on its face' does not in itself justify an in-

> junction against good faith attempts to enforce it, and . . . appellee Harris has failed to make any showing of bad faith, harrassment, or any other unusual circumstance that would call for equitable relief." Id., 91 S.Ct. at 755, 27 L.Ed.2d at 681.

These principles were followed and held to prohibit either the grant of injunctive or declaratory relief in: *Byrne v. Karalexis,* 400 U.S. —, 91 S.Ct. 777, 27 L.Ed. 2d 792 (1971); *Dyson v. Stein,* 400 U.S. —, 91 S.Ct. 769, 27 L.Ed.2d 781 (1971); *Boyle v. Landary,* 400 U.S. —, 91 S.Ct. 758, 27 L.Ed.2d 696 (1971); *Samuels v. Mackell,* 400 U.S. —, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971); *Perez v. Ledesma,* 400 U.S. —, 91 S.Ct. 674, 27 L.Ed.2d 701 (1971).

Upon reflection, we can perceive of no logical reason why the longstanding policy of "comity" and "Our Federalism" which compelled this Court to lay down the rule followed in *Younger v. Harris* and its progeny, becomes any less compelling simply because a federal court is asked to enjoin a pending state court civil action brought to enforce a state statute rather than a pending criminal prosecution. In both instances the same disruption and the same interference with orderly state procedures occur regardless of the label assigned to the state court proceeding. If the caveat contained in these opinions means that the restrictions upon the exercise of the powers of equity to grant injunctive or declaratory relief with regard to pending civil proceedings in state court is any less stringent than in *Younger v. Harris,* then we are met with a dilemma. Many penal statutes not only provide for criminal sanctions, but in addition allow civil proceedings to enjoin conduct which violates the penal statute. Therefore, resort to the labels of "civil" and "criminal" as a guidepost for the application of the principles of *Younger v. Harris* would result in the strange

anomaly of making the federal district court's authority to either grant or withhold equitable relief in a given factual situation wholly dependent upon whether the statute is being enforced in a civil or a criminal proceeding. Judicial logic cannot justify such a result.

Reason compels that the *Younger v. Harris* rule for granting equitable relief be applied to the case now before this Court.

The Complaint alleged that Plaintiffs and their class will suffer "serious and irrevocable" injury if not granted declaratory and injunctive relief; that they lack a "plain, adequate or complete remedy"; that any remedy other than that requested "would be attended by such uncertainties and delays as to deny substantial relief, would involve a multiplicity of suits; [and] would impose upon the plaintiffs deprivations of their First Amendment freedoms." (A. 29). These are bare bone allegations unsupported by any facts in the record.

There is no showing that litigating the constitutional issues regarding the Regents Rules in the single pending state court action and pursuing an appeal to this Court will not afford the plain, adequate or complete protection of the federal rights involved. There is no showing that our Texas courts are unmindful of or incapable of protecting those rights.

The alleged uncertainties and delays attendant to the state court procedures are wholly unidentified in the Complaint, and the record is silent as to what they are. The only delays to date have been occasioned by this appeal to the federal court for relief. The same holds true of the allegation of a multiplicity of suits. Regents have brought only one court action and have

threatened no others. Multiplicity was occasioned by Appellees.

As to any deprivation of First Amendment freedoms, the record presents nothing more than the bare "chilling effect" which is always present in a statute which regulates conduct associated with First Amendment freedoms. There is no showing that unless the requested relief is granted there is a great and immediate danger that Appellees' newspaper and publication ventures will perish as a result of restricting their place of sale to the areas designated under the rule, or that Appellees' political organizations will dwindle and die if dues can be solicited only in the manner prescribed by the Regents.

The record contains no suggestion that the Regents brought the state court action in bad faith or that it is but one of a series of harrassing actions designed to suppress the exercise of Appellees' constitutional rights. In short, Appellees have failed to show any of the factors necessary under *Younger v. Harris,* and its companion cases, to justify the declaratory or injunctive relief granted by the court below.

IV. *Regents' Rule 6.11 Is a Permissible Regulation of Conduct Associated With First Amendment Rights.*

Regents submit that under the principles and authorities presented in the foregoing sections of this brief, the court below was wholly unauthorized and unwarranted in granting the relief contained in its opinion and judgment. For those reasons the judgment of the court below should be reversed and the case remanded with orders to dismiss. But, in the sole event that this Court does not agree with Regents contentions in that regard, the following argument concerning the

validity of the Regents' Rules is presented for the consideration of this Court. Regents, upon the record, make the express reservation that in the event this Court reverses and remands this case without consideration of the merits, nothing contained in this portion of their brief will be binding upon the Regents in the pending state court proceedings nor will it prevent or preclude the Regents from making additional or different arguments concerning the validity of their rules in such state court proceedings.

At the outset it must be recognized that this Court has on many occasions stated that First Amendment rights are not absolutes. Conduct upon public owned property open to the general public may be constitutionally regulated as to time, place or manner, even though that conduct is inextricably entwined with First Amendment freedoms, when the purpose of the regulation is to preserve order and protect the public in the use of the property. *Walker v. Birmingham,* 388 U.S. 307 (1967); *Cox v. Louisiana,* 379 U.S. 536 (1965); *Poulos v. New Hampshire,* 345 U.S. 395 (1952); *Kovacs v. Cooper,* 336 U.S. 77 (1948); *Cox v. New Hampshire,* 312 U.S. 569 (1941); *Cantwell v. Connecticut,* 310 U.S. 296 (1939); *Schneider v. Irvington,* 308 U.S. 147 (1939). These cases recognize that even though First Amendment freedoms are incidentally curtailed by such regulations, they are valid if they further a substantial governmental interest and their application is not subject to the arbitrary discretion of a public official. Perhaps the rule has best been stated by the Court in the following language:

> ". . . when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment rights.

> To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms; compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

United States v. O'Brien, 391 U.S. 367, 376-377 (1968). And, as this Court has often observed, the application of this test places upon the Court the "delicate and difficult task . . . to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights." *Talley v. California,* 362 U.S. 60 (1960); *Breard v. Alexandria,* 341 U.S. 622 (1950); *American Communications Assoc. v. Douds,* 339 U.S. 382 (1949); *Thornhill v. Alabama,* 310 U. S. 88 (1940); *Schneider v. Irvington,* 308 U.S. 147, 161 (1939).

Where public property is not dedicated to the use of the general public, but is instead set aside and preserved for the limited purpose of carrying out a governmental function, the government has an unquestioned legitimate interest in preserving that property for its intended use. *Tinker v. Des Moines Community School Dist.,* 393 U.S. 503 (1969); *Cameron v. Johnson,* 390 U.S. 611 (1968); *Adderly v. Florida,* 385 U.S. 39 (1967); *Cox v. Louisiana,* 379 U.S. 559, 562 (1965). "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Adderly*

v. Florida, supra, at 47. These cases teach that conduct mixed with speech may constitutionally be prohibited or regulated as to time, manner and place, where such conduct unreasonably interferes with the dedicated purpose of property.

With these principles in mind we approach the constitutional barrage leveled at the Regents' Rules.

The court below rightfully recognized that the Regents' interest in preventing substantial disruption of the educational processes of the institutions under its control furthered a "compelling" state interest which "justifies some reasonable regulation." (A. 170). However, that court went on to find that Regents' Rules 6.11 and 6.12 were invalid because first, they vested standardless discretion in University officials to either grant or withhold permission to exercise First Amendment rights, (A. 172), and secondly, they are overbroad in that they "broadly stifle fundamental personal liberties when the end can be more narrowly achieved." (A. 171).

Insofar as Rule 6.12 vests in the institutional head the power to approve "solicitation or fund-raising for the needy or suffering, relief of the poor, or for public benevolent purposes" (A. 32), Regents admit that such Rule is tainted with those qualities of censorship and discretionary licensing power which were condemned by this Court in *Staub v. Baxley,* 355 U.S. 313 (1958); *Largent v. Texas,* 318 U.S. 418 (1942); *Cantwell v. Connecticut,* 310 U.S. 296 (1939); *Schneider v. Irvington,* 308 U.S. 147 (1939); *Hague v. C.I.O.,* 307 U.S. 496 (1938). But, by admitting that Rule 6.12 is constitutionally unsound in this respect, Regents do not admit that they do not have the power or authority to promulgate a rule, free of these features, which

would either prohibit altogether or impose reasonable restrictions upon the campus conduct of groups of students organized and banded together for whatever purpose. *Waugh v. Board of Trustees,* 237 U.S. 589 (1914); *Webb v. State University of New York,* 125 F.Supp. 910 (N.D. N.Y. 1954) appeal dismissed for want of substantial federal question 348 U.S. 867. Recognizing the infirmity of Rule 6.12, Regents will not argue the validity of other portions of that rule.

As to the holding that Regents' Rule 6.11 also vests arbitrary discretion in the administration, that conclusion was based solely upon the language of subdivision (2) of the rule which permits "the sale of . . . any publication authorized by an agency of a component institution." Viewing this language in a vacuum, perhaps the conclusion of the court below would be justified. However, the record shows that this provision has been construed in a narrow and precise manner. The term "agency" as used in the quoted phrase means a school or division of a component institution.[7] A "component institution" is one of the universities or other facilities comprising the System.[8] The publications that are sold under the questioned language of 6.11(2) are publications of the school or division;[9] they have the prior approval of the Regents;[10] and are related to the scholarly or educational subjects of the school or division.[11] These publications are sold either by subscription or at the office of the sponsoring school or depart-

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[7]Pages 11-13, deposition of Regents' Chairman Frank C. Erwin, placed in the record as an attachment to the Affidavit (A. 68) of Appellees' counsel.

[8]Id., at 3-4.

[9]Id., at 11-12.

[10]Id., at 13-14.

[11]Appendix 132, answer to interrogatory No. 2.

ment and not upon the campus malls."[12] Therefore, as construed and applied, the questioned language, contrary to the opinion of the court below, does not confer unbridled discretion upon an administrator of The University. No one is authorized by it to permit *Newsweek* and *U.S. News & World Report* to be freely sold upon the campus while denying the same authorization to Appellees' *Rag* and *The Militant*. The manner in which that portion of Rule 6.11 has been applied and construed is a part of the rule. *Foley v. Benedict,* 122 Tex. 193, 55 S.W.2d 805 (1932). When the validity of an administrative rule or regulation is placed in question, the longstanding practice in its application should be looked to in determining the interpreation placed upon it by the agency. *Udall v. Tallman,* 380 U.S. 1 (1965). The agency's interpretation of the meaning and application of its own rules and regulations is controlling unless plainly erroneous or inconsistent with the wording of the regulation. *Immigration Service v. Stanisic,* 395 U.S. 62 (1969); *Thorpe v. Housing Authority of Durham,* 393 U.S. 268 (1969). An otherwise invalid regulation may be sustained where it has been given a narrowed and acceptable limiting construction. *Younger v. Harris,* 400 U.S. —, 91 S.Ct. 746, 753, 27 L.Ed.2d 669, 679 (1971). Consequently, as construed and applied subdivision (2) of Rule 6.11 does not suffer the constitutional infirmity assigned by the court below.

Passing to the question of whether Regents' Rule 6.11 is overly broad insofar as it restricts the sale of newspapers and publications to the areas designated on the Austin campus, it should be noted that no contention is made that the rule has been applied with

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[12]Appendix 161-162, stipulation No. 6.

other than an even hand, nor is any contention made that the rule is vague or indefinite.

The opinion of the court below finds Rule 6.11 to be overly broad because it is "unreasonably restrictive" and fails to strike "at the very evil they wish to prevent." It further finds that the Regents have not spoken "with that small calibre precision required of regulations touching first amendment rights." (A. 171). Then strangely, the court states that in holding the rule invalid it does not intend to impair the right of the Regents to prohibit activity that is disruptive of the educational atmosphere on campus. Regents submit that in essence all the court below said was: "We recognize your right to regulate the conduct of selling newspapers and publication upon the campus in order to prevent disruption of the educational atmosphere, but we do not agree with the manner in which you have gone about it." The court then suggests a number of its own alternative methods of regulation which Regents submit would present more constitutional problems then they solved and in addition would require a constant system of extensive policing for their enforcement.

The record clearly shows that as a result of the solicitation of the sale of newspapers and other publications on the campus at Austin, classroom and laboratory routine has been disrupted and students, professors and employees have been annoyed upon the campus and in dormitories. Unlike the facts in *Tinker*, here there is experience of disruption as a result of the speech connected conduct regulated by the rule. That disruptive exprience continued up until the time the Regents took action in state court to enforce their solicitation rule. Rule 6.11 is in no way directed at the content of any newspaper or publication. Also unlike

Tinker it does not single out an unpopular viewpoint for regulation while exempting the popular. In short it treats all newspapers and publications alike that are not sponsored by The University.

With all due respect to the court below, the Regents did speak to the evil they wished to prevent—disruption resulting from the solicitation of the sale of newspapers, magazines and other wares upon the campus. However, in an effort to accommodate the publishers of newspapers, magazines and other publications, Regents created an exception in the rule which would allow their sale on the campus. This could best be accomplished, in the considered judgment of the Regents and the administrators on the Austin campus, by restricting such sales to vending machines at locations upon the campus which provide suitable exposure for sales and least interference with the operation of The University processes. Courts are not to judge whether such regulations are wise or expedient but only whether they are a reasonable exercise of the power and discretion of the school authorities. *Waugh v. Board of Trustees,* 237 U.S. 589, 597 (1914); *Tinker v. Des Moines Community School Dist.,* 393 U.S. 503, 525-526, (1969) (Justice Black dissenting); *Lassister v. Northampton County Bd. of Elections,* 360 U.S. 45, 53 (1959); *Barker v. Hardway,* 283 F.Supp. 228 (S.D. W.Va. 1968) aff'd 399 F.2d 638 (5th Cir. 1968) cert. den. 393 U.S. 856; *Stevenson v. Wheeler County Bd. of Ed.,* 306 F.Supp. 97 (S.D. Ga. 1969) aff'd 426 F.2d 1154 (5th Cir. 1970) cert. den. —— U.S. ——; *Esteban v. Central Missouri State College,* 415 F.2d 1077 (8th Cir. 1969) cert. den. 398 U.S. 965; *Kuszynski v. City of Oakland,* 322 F.Supp. 689 (N.D. Calif. 1971).

For after all, in deciding how best to cope with conduct that is incompatible with an efficient and effective

educational system, who is the better equipped to make the determination of what is necessary and reasonable? The school administrators who are familiar with the physical facilities, atmosphere and operation of the system, and whose education and experience has fitted them for running such a system, or judges who may have not set foot upon the campus in recent years, if ever at all? The choice is obvious and the Constitution does not dictate otherwise. Judges may not strike down a law or regulation simply because they do not like it. *Tinker v. Des Moines Community School Dist., supra,* at 520 (Mr. Justice Black dissenting). If the decision is in that range where reasonable minds may differ then the decision of the school authorities must prevail. *Pound v. Holladay,* 322 F.Supp. 1000 (N.D. Minn. 1971). The states and their local authorities are better equipped to deal with matters of school discipline and administration than the courts. *Karr v. Schmidt,* —— U.S. ——, 91 S.Ct. 592, 27 L.Ed.2d 797 (1971) (Mr. Justice Black, Circuit Justice).

Regents' Rule 6.11 is reasonable and meets the test of this Court for regulation of speech connected conduct as summarized in *United States v. O'Brien,* 391 U.S. 367, 376-377 (1968).

Breard v. Alexandria, 341 U.S. 622 (1950), squarely sustains the Regents' Rule 6.11. There the city passed an ordinance which prohibited all solicitors and peddlers from going in and upon private residences without having been invited or requested to do so by the owner or occupant of the residence. The ordinance was enacted because various householders had complained to the city officials that some solicitors were discourteous and that uninvited solicitors were an intrusion upon their privacy. A group of door-to-door solicitors of magazine subscriptions were charged with violating

the ordinance and upon conviction urged that the ordinance violated the Fourteenth Amendment Due Process Clause, the Commerce Clause and First Amendment freedom of speech. The ordinance was sustained by this Court. Several of the statements of the Court in that opinion seem strikingly appropriate to the case at hand.

> ". . . opportunists, for private gain, cannot be permitted to arm themselves with an acceptable principle, such as that of a right to work, a privilege to engage in interstate commerce, or a free press, and proceed to use it as an iron standard to smooth their path by crushing the living rights of others to privacy and repose. This case calls for an adjustment of constitutional rights in the light of the particular living conditions of the time and place. Everyone cannot have his own way and each must yield something to the reasonable satisfaction of the needs of all." Id., at 626.

The publishers of newspapers and magazines sold by solicitors are no more free to violate regulations designed to protect private rights than are other type solicitors. Id., at 637. Simply because they cannot make as much money by the solicitation methods left open to them does not present a constitutional objection. Id., at 638. While the fact that money is made from the sale of the publications does not remove them from the protection of the First Amendment, nonetheless that protection does not mean that those who distribute them may do so how, when and where they choose. Id., at 642.

And finally, paraphrasing the conclusion of the Court at 644-645:

> "This makes the constitutionality of [Regents' Rule 6.11] turn upon a balancing of the conveniences between [Regents] desire for [maintaining

an undisturbed educational facility] and the publisher's right to distribute publications in the precise way that those soliciting for him think brings the best result.

". . .

"[Purchases] may be made by anyone interested in receiving the [publications] without the annoyances of [building to building and person to person] canvassing. We think those [school administrators] that have found these methods of sale obnoxious may control them by [Rules]. It would be, it seems to us, a misuse of the great guarantees of free speech and free press to force a [university] to admit the solicitors of publications to the [buildings and malls of its campus]. We see no abridgment of the principles of the First Amendment in this [Rule]."

Breard v. Alexandria, supra, is particularly appropriate because *Adderly v. Florida,* 385 U.S. 39, 47 (1967), likens state property dedicated to a special use to the property of a private owner.

Kuszynski v. City of Oakland, 322 F.Supp. 689 (N.D. Calif. 1971), is also apposite. There the board charged with governing a municipal airport terminal enacted a regulation to control commercial and noncommercial solicitation within and around the terminal. The regulation limited commercial and noncommercial solicitation to specified areas; restricted the length of time for such conduct and the number of persons who could participate. Kuszynski and others who wished to distribute newspapers and handbills critical of the military and the Vietnam policy challenged the ordinance as being an impermissible restraint upon the exercise of First Amendment rights and an impermissible delegation of power to the airport manager to determine what literature might be distributed. With regard to

the restrictions upon time and manner of distribution, the court observed that Oakland had a right to operate the terminal in "an uncrowded, uncontentious, pleasant, edifying, non-obscene, non-controversial manner"; that the general traveling public has a "right not to have their private thoughts intruded upon, and to be free of harrassment, controversy and humiliation"; that while "plaintiffs and others have the right to freely express their ideas. Unfortunately, all of these rights cannot, without limitation, exist side by side." Id., at 691. Noting that the restrictions that may be imposed upon the dissemination of newspapers and periodicals vary from circumstance to circumtance and that the extent of the restrictions which may be imposed upon these activities on property open generally to the public is quite different from those permissible upon private or public property devoted to a specific purpose, the court sustained the regulation and, in language particularly appropriate to the situation presented by Regents' Rule 6.11, stated:

> "The airport manager has a job to do and that is to make the airport as efficient, attractive and inviting a facility as is possible. He has responsibility to the plaintiffs, but it is secondary. He must permit them to exercise their rights of free speech in as broad a fashion as is possible without interfering with his primary job, the running of the air terminal. . . . it appears that the restrictions imposed are entirely reasonable. Under the ordinance there is permitted a wide latitude of distribution over many areas of the facility. All restrictions appear reasonable (sic) related to the nature and use of the air terminal and justified under the circumstances." Id., at 692.

See also: *Valentine v. Chrestensen,* 316 U.S. 52 (1942).

There is no showing that the Austin campus has been opened to the use of the public in general as in

Food Employees v. Logan Valley Plaza, 391 U.S. 308 (1968); *March v. Alabama,* 326 U.S. 501 (1946); *Tucker v. Texas,* 326 U.S. 517 (1946); *Wolin v. Port of New York Authority,* 392 F.2d 83 (2nd Cir. 1968), cert. den. 393 U.S. 940. In fact, The University administration has specific statutory authority to refuse the entry of any person with no legitimate business upon any property under its control. §9, Article 2919j, Vernon's Texas Civil Statutes. Also, contrary to the Appellees' contention, the malls of the Austin campus have not been maintained as a traditional free speech area."

Lastly we turn to the Appellees' contention that Rule 6.11 unconstitutionally discriminates against them. While it is true that the Rule 6.11 contains classifications of different types of permissible solicitation, all within a given classification are treated equally. Each classification is of a separate and distinct character, based upon logical differences in the type of solicitation involved. They are not based upon irrelevant or capricious considerations nor are the lines drawn upon the basis of wealth, race or conditions deemed invidious. Absent these factors, the classifications may rest upon any reasonable basis that can be conceived. *McDonald v. Board of Election Com. of Chicago,* 394 U.S. 802, 807-808 (1969); *Harper v. Virginia State Bd. of Elections,* 383 U.S. 663, 668 (1966); *Lassister v. Northampton County Bd. of Elections,* 360 U.S. 45, 51-52 (1959). The classifications are subject to none of these defects.

The only distinction between categories of permissible solicitation of which Appellees could possibly com-

"Affidavit of Edwin B. Price (A. 159). This contention is further refuted by the fact that a large area is maintained for purposes of free speech (A. 159, 162), which would be unnecessary if the malls were free speech areas.

plain is that established by subdivisions (2) and (4) of Rule 6.11. But here again, the distinction is not without reason and logic. The publications authorized for sale under subdivision (2) are publications of The University or its subdivision. They are authorized and used to either further the educational function of The University and its departments or to provide a service to the student community as a whole. Subdivision (4) restricts the sale of all other newspapers and publications to the prescribed areas. This classification includes all non-university sponsored publications. Surely the fact that The University chooses to publish, and either sell or distribute upon *its own property,* material that is calculated to further the educational purposes to which that property is dedicated, does not mean that the Fourteenth Amendment or any other provision of the Constitution requires that every other purveyor of printed material be allowed to roam the campus at will, or even be accorded the opportunity to sell their wares at the same places The University chooses to sell its own publications. Neither reason nor the Constitution dictate that result.

The real issue presented by this case is not one of discrimination, either in the rule itself or the manner in which it is enforced. Neither is it whether there is a denial of the right of free speech or free press. It is rather, a conflict between students and duly constituted school officials over who is the better qualified to say where, when and how the sale of newspapers and other publications may best be accommodated upon the campus without disruption and offense to the maintenance of an ordered educational atmosphere. The record shows that numerous newspapers are regularly sold at the designated areas on the campus. There is nothing to show that these areas are calculated to discourage

sales of the newspapers or that they were not selected with complete fairness and good faith on the part of the school officials.

> "There seems to be a tendency in this country —and it is especially prevalent among students— toward the view that if one only believes strongly enough that his cause is right, then one may use in advancing that cause any means that seem effective at the moment, whether they are lawful or unlawful and whether or not they are consistent with the interests of others. The law, of course, cannot and does not take that position, and those who do must not expect to receive substantive protection from the law; to the contrary, they must expect to be punished when they violate laws and college regulations which are part of a system designed to protect the rights and interests of all."

Scott v. Alabama Board of Ed., 300 F.Supp. 163, 168 (N.D. Ala. 1969). See *Tinker v. Des Moines Community School Dist.*, 393 U.S. 503, 525-526 (1969) (Mr. Justice Black dissenting).

CONCLUSION

For the reasons stated herein the judgment of the court below should be reversed and the cause remanded with instructions to enter an order of dismissal. In the alternative, upon the merits, that portion of the judgment of the court below holding Regents' Rule 6.11 to be unconstitutional should be reversed and judgment here rendered sustaining the validity of such rule.

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CERTIFICATE OF SERVICE

I, W. O. Shultz II, one of the attorneys for the Appellant, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of May, 1971, I served three copies of the foregoing Brief of Appellant together with three copies of the Appendix in this cause, upon the Appellees by depositing same in the United States Mail, postage prepaid, and addressed to Appellees' attorney of record as follows: David R. Richards, 205 AFL-CIO Building, 308 West 11th Street, Austin, Texas 787

W. O. SHULTZ II

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-55

BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM,

Appellant,

—v.—

NEW LEFT EDUCATION PROJECT, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

BRIEF FOR APPELLEES

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BRIEF FOR APPELLEES

Jurisdiction

Appellees reassert that this matter did not require the convening of a three-judge court, and as a consequence the appeal should be dismissed for lack of jurisdiction.

We agree with Appellant that the judgment (A. 176) was intended to be the judgment of a three-judge court and consider it immaterial that it was signed by only a single judge. The question is whether an injunction against a Regents' rule governing campus conduct requires a three-judge court under 28 U.S.C. §2281.

"The reconciling principle" of the cases under Section 2281 is a "procedural protection against an improvident

state-wide doom by a federal court of a state's legislative policy," *Phillips* v. *United States*, 312 U.S. 246, 251 (1941). It has been consistently the view that "congressional enactments providing for the convening of three-judge courts must be strictly construed," *Allen* v. *State Board of Elections*, 393 U.S. 544, 561 (1969). This Court has been uniformly of the view that:

> "'Despite the generality of the language' of that Section, it is now settled doctrine that only a suit involving 'a statute of general application' and not one affecting a 'particular municipality or district' can invoke [Section 2281]" *Rorick* v. *Board of Commissioners*, 307 U.S. 208, 212 (1939); *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218, 228 (1964); *Moody* v. *Flowers*, 387 U.S. 97, 101 (1967).

While recognizing that the actions of the University of Texas Regents have impact beyond the Austin, Texas campus, Board rules and regulations are not of general application, nor do the rules affect a significant percentage of the public institutions of higher learning in Texas. The Higher Education Coordinating Act of 1965 listed at that time thirty-one "public junior colleges" and twenty-three "general academic teaching institution[s]" functioning in the state. Of these fifty-four colleges only three were, and are, under the jurisdiction of the University of Texas Regents,[1] Tex. Rev. Civ. Stat. Ann., article 2919e, sec. 2 (Supp. 1970-71).

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[1] There are in addition certain medical and dental schools under the jurisdiction of the Board of Regents. The listing in Regents' brief (p. 5-6) includes institutions which are only in the planning stage, e.g. the University of Texas at San Antonio (Art. 2606c-3) and the University of Texas of the Permian Basin (Art. 2606c-4).

This same statute created the Coordinating Board, Texas College and University System which, according to the statute, "shall represent the highest authority in the State in matters of Public Education," *(id. sec. 10)*. Thus the Board of Regents of the University of Texas System is a subordinate body within the structure of the state's higher education system and the rules of the Board affect only a fragment of the institutions of higher learning in Texas. Under the circumstances we continue in the view that a three-judge court was not required.

Regulations Involved

The Plaintiffs attacked two intertwined regulations of the Board of Regents which restricted solicitation on the campus of the University of Texas at Austin. The Regents have for the first time conceded partial invalidity of the regulations (Brief, p. 41). Nevertheless, both regulations remain at issue because of the limited concession of unconstitutionality and because the two regulations are interwoven beyond extrication. The regulations the court below found unconstitutional are here reproduced.

1. Commercial solicitations will not be authorized on the campus of any component institution of The University of Texas System, except as otherwise provided in this section. Commercial solicitations include the sale, contract of sale, advertisement or promotion for sale, disposition of or contract to dispose of any item of personal property; the inducement of any person, group, or organization to contract with regard to any item of personal property, service, or anything that the offerer may offer; or the solicitation of funds or personal property.

The following commercial solicitations are permissible:

(1) commercial solicitations in a Student Union Building that have been approved by the Board of Directors or by the appropriate union governing body subject to applicable institutional rules and regulations and applicable Regents' Rules and Regulations;

(2) the sale of any authorized student publication or any publication authorized by an agency of a component institution;

(3) any commercial solicitation made pursuant to a contract or agreement between the administration of a component institution and the vendor;

(4) the sale of any newspaper or other publication by means of a vending machine located in a campus building, if a certain area or areas within a campus building have been designated in advance by the institutional head or his representative as appropriate for such sales; and

(5) any commercial solicitation necessary for the normal administration, operation, and maintenance of any component institution as an educational institution.

2. No noncommercial solicitations, including fund raising for charity, shall be permitted on a campus of a component institution of The University of Texas System without the prior approval of the institutional head or his delegate.

6.121 Such approval by the institutional head may be granted for solicitation or fund raising for the

needy or suffering, relief of the poor, or for public benevolent purposes, but it may not be granted for the personal benefit of an individual, group, or registered student organization, to pay for monetary indebtedness incurred by an individual, group, or registered student organization, to pay any fee, fine, or other charge arising from a violation of federal, state, or local law.

6.122 Any noncommercial solicitation, including fund raising for charity, that is approved by the institutional head or his delegate shall be conducted in accordance with reasonable institutional regulations regarding time, place, procedure and financial reporting and accountability.

6.123 Notwithstanding the provisions of Section 6.121 above, with the approval of the institutional head or his delegate, a registered student organization may solicit or raise funds from its own members for the benefit of the organization but only at official meetings of the organization.

Questions Presented

Appellant's questions do not fairly state the issues.

1. Appellant's Question 1 presumes a matter highly in dispute, i.e. that all Plaintiffs were part of the same "class." In our view the record will not sustain this assertion and hence the question does not fairly raise the issue.

2. Appellant's Question 2, and the argument thereunder, distorts the judgment of the court below both as to intent and effect, for the court below never purported to "stay proceedings in the state court."

3. Appellant's Question 3 is too narrow. In our view the constitutionality of Regents' Rule 6.12 (set out above) remains at issue.

Appellees consider the following questions to be presented:

1. Did the court below properly refuse to abstain?

2. Do Regents' Rules 6.11 and 6.12 violate the speech and association rights of the Young Democrats and Young Socialists as guaranteed by the First and Fourteenth Amendment?

Statement of the Case

Essential to the Regents' arguments is the contention that all Plaintiffs were members of a single class, those that are before this Court as Appellees and the original plaintiffs who were severed, dismissed and relegated to the state court.[2] Because this contention does not fairly state either the position of the Plaintiffs below or the action of the three-judge court, we are compelled to expand substantially Regents' statement of the case.

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[2] "Regents theory in the application of these principles [*England* and *res judicata*] is dependent upon its contention that 'Part A' Plaintiffs and 'Part B' Plaintiffs are, as they themselves alleged and argued in the court below, members of the same class." (Appellant's Brief, p. 26.) Although the argument is somewhat obscure, the same contention presumably underlies Regents' argument under 28 U.S.C. Section 2283 (Brief, p. 30).

The Evolution of the Case

1. The Original Plaintiffs.

Suit was begun on August 1, 1969 by a group of Plaintiffs denominated by the court below as "Part A" Plaintiffs. They sued on their own behalf and on behalf of a class comprised of "those persons who may be now or in the future associated or engaged in the publication and/or distribution of 'The Rag'"[3] (A. 4). They sought to enjoin the Regents from further prosecution of a state court action which had been instituted to restrain the distribution on the University campus of an underground newspaper known as "The Rag." The Regents answered, alleging among their defenses, that the court "should dismiss the action because all of the issues sought to be raised by plaintiffs can be fully resolved in the prior civil proceeding against them pending" in the state court (A. 10). The Regents also suggested the necessity of a three-judge court, asserting that the regulation in question "Section 6.11" of the Regents' rules constituted an administrative order within the meaning of 28 U.S.C. 2281 (A. 15).

2. The Motion to Amend and Join Plaintiffs.

On November 7, 1969, before the court had acted on the initial contentions of the Regents, Plaintiffs filed a Motion for Leave to Amend asserting that "new parties plaintiff desire to join in this action to assert the infringement of their own constitutional rights" and alleging that since the filing of the initial complaint the rules and regulations

[3] These Plaintiffs were denied relief and dismissed by the court's order of December 17 (A. 41). There was never a determination as to the propriety of the purported class.

under consideration had been "substantially amended" (A. 20-21). The amended complaint sought to join as a plaintiff the Young Democratic Club at the University of Texas, alleging that in the past the club had "been permitted to solicit dues from members on the campus of the University at the time the member made application for membership" (A. 26) and that the Regents now sought to prohibit this "traditional" means of securing membership and membership contributions, thereby depriving the Young Democrats of the "only effective way of securing their timely dues payment" (A. 26). In a separate paragraph of the complaint a new class of plaintiffs sought to join the action, alleging that they were individual students at the University of Texas having an interest in the "free flow [of] ideas and the flourishing of public debate at the University of Texas" (A. 24). Neither the Young Democrats nor the new "class" alleged any interest in the distribution of "The Rag" and neither sought to intervene as a member of the original class, seeking only joinder pursuant to Rule 20(a).

The Regents opposed joinder asserting that the contentions of the Young Democrats involved "different rules" than those at issue between the Regents and "The Rag" and that "[t]o allow these two distinct claims to be presented in a single law suit would delay and complicate this litigation . . . " (A. 35). Alternatively the Regents asserted that if joinder was allowed the court should sever the claim of the Young Democrats from that of "The Rag" plaintiffs (A. 35). The Plaintiffs responded claiming it would "be burdensome on the federal judiciary to compel the Young Democrats to file a separate action, thus requiring the convening of a second three-judge court" (A. 38).

3. The Court's Order Allowing Joinder Under Rule 20 and Severing and Dismissing the Original Plaintiffs.

On December 17th the Court disposed of all pending matters, allowing amendment of the complaint and joinder of the new parties. The Court simultaneously effected a severance. The original plaintiffs ("Part A") who were defendants in the pending state court action, were dismissed "so that there will be no interference with the state court's exercise of its jurisdiction" (A. 42). As to the Young Democrats and the individuals joined that day ("Part B" plaintiffs), the Court retained jurisdiction for "further proceedings" (A. 43).

4. The Intervention of the Young Socialist Alliance.

On January 8, 1970, the Young Socialist Alliance sought to intervene as a party plaintiff as a "member of a class of persons interested in the full enjoyment of First Amendment rights for all those in attendance at the University of Texas as described in paragraph III(c) of Plaintiff's First Amended Complaint" (A. 45). The intervention motion incorporated a disciplinary notice from the University of Texas charging that the Young Socialists had failed "to comply with regulations regarding the selling of literature and the installation of a booth" (A. 46). No opposition to the intervention was filed and on February 10, 1970, intervention was allowed (A. 48).

The Disposition of the Case

1. The Motion for Summary Judgment.

"The Plaintiffs in Part B of this action together with the Young Socialist Alliance" (A. 56) moved for summary

judgment pursuant to Rule 56 asserting that Regents' Rules 6.11 and 6.12 violated the First Amendment rights of their respective organizations.[4]

2. The Evidence and Contentions of the Parties.

The Young Democrats had "functioned" on the University campus for many years engaging in "activities typically associated with any political organization," including "the solicitation of members to join the organization and to work in political endeavors" (A. 58). In the fall of 1969 the Regents for the first time applied regulations (Sections 6.11 and 6.12) to the Young Democrats prohibiting solicitation of membership dues on the campus (A. 58). Although the Regents later modified the regulations to permit dues solicitation during registration,[5] the Young Democrats asserted that despite this relaxation of the Regents' rules their organization was nevertheless denied the right to solicit dues during the balance of the year and prohibited from selling political literature on the campus. The affidavit of Mr. Dolfi, President of the Young Democrats, concluded:

> "Although we can erect a booth and can distribute literature so long as we do not levy a charge for it, this limitation imposes substantial economic hardship upon our organization and limits our capacity to discharge our function as a political organization."

[4] When the motion was orally submitted, Regents conceded that there was no factual issue that required further development (Transcript of Proceedings, June 26, p. 44).

[5] This represented the second modification of the rules in question following the filing of the suit; the Young Democrats accordingly solicited membership dues during registration for the spring semester of 1970 (A. 58-59).

> It continues to be commonplace for various organizations with University approval to sell on these areas of the campus items for fund raising purposes . . ." (A. 59).

The Young Socialists had existed at the University since 1960, as "an independent Socialist organization, having as one of its principal goals the dissemination of political ideas" (A. 61). The organization customarily sold "The Militant," the weekly newspaper of the Socialist Workers' Party and books and tracts on Socialism (A. 61), "not for the purpose of making a profit for the organization but solely to disseminate political speech" (A. 62). The Young Socialists, as the Young Democrats, with permission from the University frequently erected booths on the West and Main Malls of the campus to distribute literature (A. 62, 137-9).

In December of 1969 charges were brought against the Young Socialists under Rule 6.11 "regarding the selling of literature" (A. 65),[6] while the Socialists were charged with selling literature. The University of Texas Choir was permitted at the same time to maintain an adjacent booth selling cookies for the purpose of defraying expenses for travel to Europe (A. 63). The parties stipulated that "typically there are three or four booths erected along the West Mall of the campus of the University of Texas at Austin distributing literature, sometimes there are as many as fifteen such booths and sometimes none.

[6] The Regents' answer asserted that the Young Socialists had obtained permission to sell and distribute literature within the Student Union of the University but had "exceeded such permission and sold and distributed said literature upon the West Mall of the campus of the University of Texas at Austin in violation of Regents' Rule 6.11" (A. 105).

Such booths are also permitted on the Main Mall of the campus. These booths are maintained in conformity with existing University rules" (A. 160).

In opposition to summary judgment the Regents tendered the affidavit of the Assistant Dean of Students, who described University practice:

> "If a student or organization desires to distribute a leaflet a copy is deposited with my office. . . . I review . . . to make sure that it is not obscene, vulgar or libelous or that it does not advocate the deliberate violation of any federal, state, or local law. Furthermore the material must not involve commercial solicitation. If the material complies with these rules its distribution is allowed without further regard to its content.
>
> My duties further require the granting or withholding of permission to both students and organizations to raise funds. If the purpose of the solicitation . . . is 'for the needy or suffering, relief of the poor, or for public benevolent purposes' it comes within the non-commercial provision of the Regents' Rules and permission is granted. . . . If the proposed activity comes within the category of commercial solicitation that is not allowed according to the applicable Regents' Rule then permission is not given. . . . One example of permissible non-commercial solicitation was a balloon sale by a committee of the Students Association in January of this year. The purpose of the sale was mainly to draw attention to the unfortunate circumstances of the poor people in East Austin" (A. 74).

Chairman of the Board of Regents, Frank C. Erwin, Jr., described the purpose of the University's regulations:

> "The University does not want solicitors or salesmen . . . coming onto a campus, walking up and down the walks, walking up and down the halls, and knocking on doors trying to solicit funds or sell their wares, thus interfering with the academic activities of the institution. The rules as they are presently drawn are simply a distillation of efforts over a period of years to draft rules that will prohibit that kind of solicitation and selling" (A. 153).

Exceptions to the prohibition against commercial solicitation included such activities as sale of life and hospitalization insurance by the Students Association (A. 133), selling of University publications on campus, and the daily distribution of the Daily Texan, containing substantial commercial advertising (A. 131, 160, see attachment Stipulation).

3. The Court Judgment.

Following oral submission the court entered its memorandum opinion on September 3, 1970. The court found that the Regents' Rules "seriously impede the associational activities of the organizations" (A. 163) and "a great deal of commercial and non-commercial solicitation coming within the heretofore noted exceptions to the Rules is allowed on the Austin campus" (A. 169). The court found sufficient "ambiguity" in the coverage of the Rules "to warrant considering the rules together for the purposes of the overbreadth question raised by the plaintiffs" (A. 169). The court concluded that the rules were "unreasonably restrictive of the clearly protected activities engaged

in by the plaintiffs in this case . . . . The Regents have simply failed to speak with that small caliber precision required of regulations touching First Amendment rights" (A. 171).

The decision left the way open for the Regents to "prohibit activity disruptive of the educational processes on campus" and to formulate reasonable rules to the extent that "campus congestion" or "litter" is a concern (A. 172).

The court further found that the rules constituted simply "licensing regulations that do not set out adequate guidelines for the exercise of the licensing" authority (A. 172). In accordance with the memorandum opinion a judgment was entered enjoining the Regents from enforcing against the plaintiffs Articles 6.11 and 6.12 (A. 177).[7]

The State Court Proceeding

On February 25, 1970, the state court heard and issued a temporary injunction against the original federal plaintiffs together with other defendants that had been added by amended pleadings (A. 120). None of the current federal plaintiffs were ever parties in the state court. According to the Regents' pleading the state action was concerned only that "Defendants, and each of them, are selling and distributing for a valuable consideration or causing to be sold and distributed for a valuable consideration" copies of "The Rag" (A. 122). There has been no suggestion that

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[7] The judgment did not include the original plaintiffs for as the court opinion noted: "At the same time, the court refused the original plaintiffs declaratory and injunctive relief and dismissed them as plaintiffs so that there would be no interference with the state judge's adjudication of the proceedings pending against them in state court" (A. 165).

any of the present federal plaintiffs were in any manner associated with "The Rag." There has been no further activity in the state court since issuance of the temporary injunction.

Summary of Argument

I. The rationale of *England* v. *Louisiana State Board*, 375 U.S. 411 (1964) may not be invoked against the Appellees for the simple reason that they were never parties to a state court proceeding and hence could not have "elected to forego" their right to litigate constitutional claims in the federal court.

Essential elements of res judicata are missing and to invoke res judicata to bar the Appellees would deprive them of due process. The Young Democrats and Young Socialists were never made parties to the state court proceeding. The state court proceeding was not a class action and even if it was the class did not embrace the Appellees. Every event led the Young Democrats and Young Socialists to the logical conclusion that their rights were being exclusively litigated in the federal court and it would be a manifest deprivation of due process to now deprive them of their choice of a federal forum.

Putting aside the question of parties, even if the Young Democrats or Young Socialists could somehow be deemed participants in the state court proceeding, the state court simply granted a temporary injunction, and as an interlocutory order it cannot sustain res judicata.

Regents improperly invoke the prohibitions of 28 U.S.C. Section 2283 because the district court judgment, and the

accompanying opinion, are clear; the court did not intend, and did not stay any state court proceedings.

None of the conventional reasons for abstention by the federal court are here present, and notions of comity do not mandate the federal court to stay its hand. There was no unsettled question of state law that might avoid the constitutional issue, rather regulations of the Board of Regents, as "construed and applied," *Younger* v. *Harris,* 91 S. Ct. at 752, unreasonably restricted First Amendment rights of the Young Democrats and Young Socialists. Once the federal court dismissed all plaintiffs who were participants in the state court proceeding, there remained no reason for abstention for the only potential conflict resulted from the pendency of related questions in the state and federal courts, and this "potential conflict" is insufficient to require abstention. The Young Democrats and Young Socialists having properly invoked the jurisdiction of the federal court, should not be compelled to accept a state court's determination of those claims, *England* v. *Louisiana State Board,* 375 U.S. 411 (1964).

II. The Regents, under the guise of regulating solicitation, prohibited the Young Democrats and the Young Socialists from soliciting membership contributions and from selling political literature on the campus. There were no compelling interests to support this restriction for indeed the physical areas which the Young Democrats and Young Socialists sought to use are consistently used for the distribution of literature, the sale of University sanctioned material and solicitation of charitable contributions. Under the circumstances it is unreasonable to prohibit the Democrats and Socialists from engaging in First Amendment

activities in these areas so traditionally associated with the exercise of those freedoms. The Regents may not justify the embargo against the activities of the Young Democrats and Young Socialists merely because there is a commercial connotation because "commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment," *Ginzberg* v. *United States,* 383 U.S. 463, 474 (1966).

The Regents' regulations further suffer from vagueness and overbreadth as "construed and applied" and hence are vulnerable to constitutional attack, *Younger* v. *Harris,* —— U.S. ——, 91 S. Ct. 746, 752.

Finally the regulations constituted simply licensing regulations which reposed unfettered discretion in the administrator to grant or deny permits for distribution without ascertainable standards and hence violated constitutional guarantees, *Staub* v. *Baxley,* 355 U.S. 313 (1958).

ARGUMENT

I.

A. *England* v. *Louisiana State Board is not in point*

Regents argue that proper application of the principles of *England* v. *Louisiana State Board,* 375 U.S. 411 (1964) requires reversal of the lower court judgment. The argument takes the following form: (1) The district court should have required the Young Democrats to "follow their 'Part A' brethren to the state court and intervene in that pending action" (Brief, p. 23).[8] (2) The "Part A" plain-

[8] This argument fails to speak to the Young Socialists who were allowed to intervene in February (A. 48), several months after the departure of the "Part A" plaintiffs who were dismissed in December (A. 41-43).

tiffs who were severed and dismissed have "unreservedly" presented their First Amendment contentions to the state court (Brief, p. 25).[9] (3) Hence in order to set matters right, the Young Democrats should be treated as if they had been sent to the state court and, once there unreservedly litigated their constitutional claims and thus forbidden to assert their constitutional claims in the federal court.[10] Regents' tortured analysis does not square with *England*. The court's opinion in *England* is explicit:

> "If a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then . . . he has elected to forego his right to return to the District Court." 375 U.S. at 419.

Neither the Young Democrats, nor the Young Socialists was ever in the state court; they were not made parties defendant by the Regents nor were they remanded to the state court as the Regents contend they should have been. The lower court disposed of Regents' contention quite simply:

> "The remaining plaintiffs, having never even been in the state court, can hardly be held to have relinquished their right to return, especially since this Court's earlier order left those plaintiffs in this Court for 'further proceedings' in their case" (A. 167).

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[9] Inasmuch as the "Part A" plaintiffs have not sought to return to the federal court, and because we consider the Regents' arguments so meretricious, no attempt will be made to speculate as to the proper application of the *England* principles to the "Part A" plaintiffs should they indeed seek to return to the federal court.

[10] This argument is reminiscent of Lewis Carroll. " 'Contrariwise,' continued Tweedledee, 'if it was so, it might be; and if it were so, it would be; but as it isn't, it ain't. That's logic.' " *Alice's Adventures in Wonderland,* Chapter 4.

A concomitant of the court's decision in *England* is the recognition that "the right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied," *Willcox* v. *Consolidated Gas Co.*, 212 U.S. 19, 40 (1909); *England* v. *Louisiana State Board*, 375 U.S. at 415.

The Young Democrats and Young Socialists were entitled to seek relief in the federal courts and nothing in the rationale of *England* warrants denial of their choice of forum.

B. *There is no basis for the application of res judicata*

Regents' *res judicata* arguments extend and exacerbate the arguments made under *England* v. *Louisiana State Board, supra.* This argument seems to say that because the federal court should have dismissed the Young Democrats "to follow their 'Part A' brethren to the state court and intervene in that pending action" (Brief, p. 23) that this "error" should now be rectified by binding the Young Democrats by the state court proceeding. Such an argument offends fundamental notions of due process, for not only did the Young Democrats not participate in the state court proceeding, nothing that occurred suggested they were considered to be participants.

The order of the three-judge court which severed and dismissed the "Part A" plaintiffs assured the Young Democrats that their contentions would "be considered by this court in further proceedings" (A. 43). Some months later the Young Socialist Alliance was told that its motion to intervene in the federal proceeding was "meritorious" and that it would be "allowed to intervene as a party plaintiff" (A. 48). Similarly, nothing transpired in the state court

to suggest to the Young Democrats or the Young Socialists that they were in any way considered to be parties in that proceeding, Regents' state court pleadings named a number of defendants (A. 89). The Young Democrats and Young Socialists were never named as parties.[11] The state court pleadings described the defendants as engaged in "selling and distributing for a valuable consideration or causing to be sold and distributed for a valuable consideration a newspaper known as 'The Rag'" (A. 91), it has never been suggested that either the Young Democrats or the Young Socialists was engaged in the distribution of "The Rag."

"It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by the service of process," *Hansberry v. Lee,* 311 U.S. 32, 40 (1940). The question of whether the Young Democrats and the Young Socialists were parties to the state court proceeding is, of course, not to be determined by what transpired in the federal court but rather what occurred

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[11] The Regents' pleadings in state court were amended on November 20, 1969, two weeks after the Young Democrats and others had sought to become plaintiffs in the federal court proceeding by their amended complaint (A. 22-30). Although the amended pleading added a number of new defendants it did not name as defendants the Young Democrats or any of the other persons seeking to become plaintiffs in federal court. Regents' argument (Brief, p. 29) that "both the state court and the federal court . . . knew that 'Part A' plaintiffs and 'Part B' plaintiffs were parts of the same class . . ." is utterly dehors the record. Nothing filed in the state court suggested that there was anything involved other than the sale of "The Rag" on the University of Texas campus and the state court judgment reflects that this was the only matter presented (A. 80-82).

in the state court.[12] Although "the judgment in a 'class' of 'representative' suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it," *Hansberry* v. *Lee,* 311 U.S. at 41, the state court pleading did not contain the class action allegations contemplated by Rule 42 of the Texas Rules of Civil Procedure. But, even if the pleadings were adequate to create a class action, the class created was limited to those engaged in "selling and distributing for a valuable consideration or causing to be sold and distributed for a valuable consideration a newspaper known as 'The Rag' " (A. 91), a class that did not embrace either the Young Democrats or Young Socialists. Taking one more step, if somehow the "class" described in Regents' state pleading did encompass the federal plaintiffs, at best it was a spurious class[13] and "no one is bound . . . except named parties, all who authorize a named party to represent them, all intervenors, and all who claim under any of such persons," McDonald, Texas Civil Practice, Vol. I,

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[12] If one looks only to the federal proceeding to determine the relationship of the parties the result is the same. The Young Democrats and the Young Socialists did not purport to become members of the original class described as persons who may be now or in the future associated or engaged in the publication and/or distribution of "The Rag" (A. 4). Rather, they sought joinder under Rule 20, which "neither has, nor was intended to have, any effect on the substantive rights of the parties," *Lansburgh and Bros.* v. *Clark,* 127 F.2d 331 (D.C. Cir., 1942), and "although plaintiffs may be joined in one action their claims remain as separate and distinct as if asserted in separate actions." Barron and Holtzoff, Wright, *Federal Practice and Procedure,* §532 at 183.

[13] Texas Rule 42 had adopted the old federal rule and in 42(a)(3) provided "when the character of the right sought to be enforced for or against the class is several, and there is a common question of law or fact affecting the several rights and a common relief is sought." Tex. R. Civ. P. 42.

Section 3.37 (1965 Revision). The Young Democrats and Young Socialists fit none of these categories.

Res judicata does not attach for a different reason that is of equal weight. The state court simply granted a temporary injunction, and res judicata attaches only to final judgments, *G. C. Merriam Co.* v. *Saalfield,* 241 U.S. 22 (1916).

The grant of a temporary injunction under Texas practice will not sustain a plea of res judicata. The Texas Supreme Court is explicit on the subject, "The order granting the temporary injunction could not be the basis of res adjudicata since it is only an interlocutory order," *Miers* v. *Brouse,* 154 Tex. 54, 271 S.W.2d 419, 421 (1954). Consistent with this view of the nature of a temporary injunction, appellate review of the grant of a temporary injunction is quite narrow, and is to be reversed on appeal only on a showing of "clear abuse of discretion by the trial court." *Texas Foundries* v. *International Molders Union,* 151 Tex. 239, 248 S.W.2d 460, 462 (1952).

The grant of temporary injunctive relief by the state court against the distribution of "The Rag" did not involve the present parties or those in privy with them, was not a final judgment, and will not sustain the plea of res judicata.

C. *The Court's judgment does not transgress the Section 2283 prohibition*

Regents' brief raises for the first time a claim that the judgment of the three-judge court "prohibits any steps to have the pending state court action set down for a hearing on the merits and the temporary injunction made permanent" (Brief, p. 31). This argument of the Regents is contrary to the record and distorts the manifest intent

of the court below. The court was at great pains to avoid interference with the state court proceeding, and its original order (A. 42) dismissed the plaintiffs that sought to impede the state court proceeding "so that there will be no interference with the state court's exercise of its jurisdiction." This was reaffirmed in the Court's memorandum opinion reflecting it had "refused the original plaintiffs' declaratory injunctive relief and dismissed them as plaintiffs so that there would be no interference with state judge's adjudication of the proceedings pending against them in state court" (A. 165).

Counsel for the Regents recognized that the court did not intend to interfere with the state court proceeding and argued that it should not grant relief to the Young Democrats because "we are going to have the situation where the people publishing 'The Rag' still can't sell 'The Rag' out there on the campus, and the Young Democrats can go out there and sell their tracts." (Transcript of Proceedings, June 26, at page 43.)

The court's judgment restrained the Regents "from further enforcement against the Plaintiffs of Article 6.11 and 6.12" (A. 177). "Plaintiffs" in this context clearly did not include the original plaintiffs who had been dismissed some nine months earlier (A. 41-43). The court's judgment granted plaintiffs' motion for summary judgment, and the motion had been made only on behalf of "plaintiffs in Part B of this action together with the Young Socialist Alliance" (A. 56). A judgment is "to be interpreted in the light of the court's opinion, findings, and conclusions of law," *Great Lakes Dredge Co.* v. *Huffman*, 319 U.S. 293, 295 (1943). The court's opinion and findings make it obvious that there was no intention "to stay proceedings in a state court" and

hence the prohibitions of 2283 are inapposite, as are the decisions discussed in the Regents' brief.

D. *The District Court was not required to abstain*

Although not expressly presented by the Regents' points, the reliance upon *Younger* v. *Harris,* —— U.S. ——, 91 S. Ct. 746 (1971) certainly gives rise to the question of abstention. At the outset the procedural maze clouds the question. However, for purposes of analysis we should be able to assume that the Young Democrats and Young Socialists simply originated this action to seek relief from Regents Rules.[14] Does the mere pendency in the state court of the Regents' action against "The Rag" preclude the district court from proceeding with the claims of the Democrats and Socialists? If so, it reflects a major extension of existing abstention doctrine and poses substantial frustration to the right of a litigant to select his forum.[15]

Once the district court dismissed the plaintiffs who were defendants in the state court, there was no reason for the federal court to stay its hand. For the "rule is well recognized that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction . . . The Federal jurisdic-

[14] This was certainly the posture of the case when it came on for hearing. Granting that the case was initiated by plaintiffs whose participation gave rise to more serious abstention problems, when those plaintiffs were dismissed from the action the abstention problems they posed disappeared with them. It makes no sense to visit upon the remaining plaintiffs the disabilities of the departed plaintiffs, to do so would smack of some outmoded notions of bastardy.

[15] Such reasoning would presumably require a district court in the Northern District of Texas to abstain if suit had been instituted by the Young Socialists, or the Young Republicans for that matter, attacking the Regents' solicitation rules as applied to the campus at the University of Texas at Arlington.

tion may be invoked and the cause carried to judgment, notwithstanding a state court may also have taken jurisdiction of the same case," *McClellan* v. *Carland,* 217 U.S. 268, 282 (1910). As Professor Wright views it, to require a federal court to refuse to hear an action or to stay an action merely because of the "pendency of an action in personam in state court" is "beyond anything required by the demands of federalism that are at the heart of the abstention doctrines." Wright, *Handbook of the Law of Federal Courts,* §52 at p. 205 (2nd Ed., 1970). As an argument for abstention we have at most related issues pending before the federal and state courts.[16] But surely our "demands of federalism" do not require the federal court to abdicate its jurisdiction merely because a related issue is pending before a state tribunal.

Nothing in the court's opinion in *Younger* v. *Harris,* —— U.S. ——, 91 S. Ct. 746, 752 fn. 4 (1971), or its companions, requires abstention. The *Younger* opinion was at pains to note that "an injunction against allegedly unconstitutional state action (discharging the employees) that is not part of a criminal prosecution" would raise "no special problem" of comity to the federal judiciary. Similarly these plaintiffs present "no special problem," for all they asked was the District Court to restrain the Regents from enforcement of an unconstitutional regulation against the Young Socialists and the Young Democrats. The organiza-

[16] The similarity of the issues between the state and federal proceeding is a matter of some dispute. In opposing joinder by the Young Democrats the Regents asserted that it was "difficult" for them to see how the claims of the Young Democrats and "The Rag" arose from the same transaction, and "impossible to see any question of law or fact common to them" (A. 34).

tions could not violate the regulations without risking loss of status as a registered student organization.[17]

Abstention may also be appropriate "where resolution of the federal constitutional question is dependent upon, or may be materially altered by the determination of an uncertain issue of state law," *Harman* v. *Forssenius,* 380 U.S. 528, 534 (1965) but this doctrine "contemplates that deference to state court adjudication only be made where the issue of state law is uncertain" (*Ibid.*), and "abstention cannot be ordered simply to give state courts the first opportunity to vindicate the federal claim," *Zwickler* v. *Koota,* 389 U.S. 241, 251. Here we have "the naked question, uncomplicated by an unresolved state law" of whether the Regents' rule as "construed and applied" [18] to the Young Socialists and the Young Democrats deprived them of protections assured by the First and Fourteenth Amendments, *Wisconsin* v. *Constantineau,* —— U.S. ——, 91 S. Ct. 507, 511 (1971.) The right of the Young Democrats and the Young Socialists to "choose a Federal court . . . cannot be properly denied," *Willcox* v. *Consolidated Gas Co.,* 212 U.S. 19 (1909) and there "are fundamental objections to any conclusion that a litigant who has 'properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims," *England* v. *Louisiana State Board,* 375 U.S. 411, 415 (1964). The Young Demo-

[17] This seems a precise parallel to the plight of the employee confronted with the unconstitutional loyalty oath in *Baggett* v. *Bullitt,* 377 U.S. 360 (1964).

[18] The court's opinion in *Younger* v. *Harris* noted the propriety of injunction against state statutes "held to be vague or overly broad as construed *and applied,*" 91 S. Ct. at 752, fn. 4.

crats and the Young Socialists properly invoked the jurisdiction of the federal court to consider claims that the Regents' rules as applied to their organizations deprived them of rights secured by the First and Fourteenth Amendments. The district court was not required to abstain merely because a related question was pending in the state court in a case involving neither the Young Democrats nor the Young Socialists.

II.

The Regents' Rules violate the speech and association rights of the Young Democrats and Young Socialists.

A. *The nature of the issue*

The Young Democrats and the Young Socialists sought the right to solicit and/or accept dues or contributions to their organizations and to levy a charge for political literature, whether it be the Socialists' "The Militant" [19] or the Young Democrats' "Axe Erwin" [20] bumper stickers. The organizations sought to do these things only in the same areas of the campus where they are presently permitted to erect booths and distribute literature, circulate petitions and engage in other forms of speech related activities, i.e. the West and Main Malls of the University Campus (A. 59,

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[19] The Young Socialists sell "The Militant," the weekly paper of the Socialist Workers Party "not for the purpose of making a profit for the organization but solely to disseminate political speech" (A. 61-62).

[20] The Young Democrats obtained permission to distribute literature as part of their "statewide axe Erwin drive" (A. 139), Erwin being the Chairman of the Defendant Board of Regents; although permitted to distribute their literature, they could not recoup the printing costs of their bumper stickers by charging for them.

62, 63). The Regents' rules (6.11 and 6.12)[21] denied these two political organizations the right to solicit dues and contributions or sell political literature on the West and Main Malls of the campus and the organizations were compelled to refrain from such activities in the face of disciplinary threats by the University administration (A. 59-65).[22] Although the West and Main Malls of the campus were closed to the Young Democrats and Young Socialists by the solicitation regulations, these campus areas were open to student organizations for the distribution of literature of all kinds (A. 137-139) and open for commercial activities sanctioned by the University, including sale of University approved publications (A. 131), sale of tickets to various activities occurring on the University campus (A. 133), sale of "cookies and coffee to raise funds for departmental scholarships" (A. 135) and solicitation of contributions for charitable purposes (A. 135).

It was undisputed, and the court so found, that the University regulations as applied to the Young Democrats and Young Socialists "seriously impede the associational activities of the organizations, primarily because the rules decrease their ability to procure both members and funds" (A. 168).

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[21] As the court below found, "It is not clear, however, which of the two rules questioned prohibit the activities engaged in by the plaintiffs" (A. 169).

[22] Both the Young Democrats and Young Socialists were registered student organizations, and University disciplinary proceedings could result in the loss of their registered status.

B. *The University campus is an appropriate place for the exercise of First Amendment freedoms*

The regents of a university, just as the officials of a municipality, "may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion," *Schneider* v. *State,* 308 U.S. 147, 160 (1939) and "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place," *Id.* at 163.

"The essentiality of freedom in the community of American universities is almost self-evident," *Sweezy* v. *New Hampshire,* 354 U.S. 234, 250 (1957). The Universities "are educating the young for citizenship" [23] and hence there is every reason for "scrupulous protection of Constitutional freedoms," *West Virginia Board of Education* v. *Barnette,* 319 U.S. 624, 637 (1943), and "In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views," *Tinker* v. *Des Moines Independent School District,* 393 U.S. 503, 511 (1968). "The fact that the state has a proprietary interest in the land and buildings is an irrelevancy," Wright, *The Constitution on the Campus,* 22 Vand. L. Rev., 1027, 1039 (1969).

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[23] On the campus of the University of Texas we are now dealing virtually exclusively with students of a voting age; with the eligibility of eighteen year olds to vote, approximately 1% of the student body is under voting age. Even before those under 21 years of age became eligible to vote, a majority of the students at the University of Texas were of voting age, for the school year beginning 1969 over 19,000 of the 35,000 students were 21 years of age or over ("Report of Distribution of Students by Age and Sex" prepared by the Registrar of the University of Texas at Austin).

C. *The regulations constituted an unreasonable direct restraint upon speech*

Although loath to be overly simplistic, we consider the regulations to be invalid because they impose a direct restraint upon speech through the guise of limiting solicitations, a "restraint" which cannot be justified because the self-same regulations permit comparable activities, thus belying the purported justification for the regulation.

To justify their rules, the Regents assert that these were simply restrictions upon solicitation necessary to prohibit commercial activity from interfering with the University functions (A. 152-156). In their brief below the Regents contended that their rules "do not restrict freedom of speech or press except as it is incidental to the activity of solicitation" (Brief, p. 19).

> "To this contention there are two answers. The first is that a State cannot foreclose the exercise of constitutional rights by mere labels. The second is that abstract discussion is not the only species of communication which the Constitution protects . . ." *NAACP* v. *Button,* 371 U.S. 415, 429 (1963).

The activity which the Young Democrats and Young Socialists seek to pursue is protected First Amendment speech. The fact that there is a commercial quality "is as immaterial in this connection as is the fact that newspapers and books are sold." *New York Times* v. *Sullivan,* 376 U.S. 254, 266 (1964) for "commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment." *Ginzberg* v. *United States,* 383 U.S. 463, 474 (1966). As the record conclusively demonstrates, we are dealing with regulations "which actu-

ally affect the exercise" of First Amendment rights, and these regulations may not be "sustained merely because they were enacted for the purpose of dealing with some evil" within the Regents' competence, *United Mine Workers* v. *Illinois Bar Association,* 389 U.S. 217, 222 (1967).

If we take the Regents at their word and assume that the regulations are designed to prevent interference "with the academic activities of the institution" (A. 153), there is no rational distinction to be drawn between permitting the sale of balloons for charitable purposes (A. 135) and prohibiting the sale of "The Militant" by the Socialist from an adjoining booth (A. 63). As the court below found, the Regents have simply failed to show any "compelling" interest to justify the impingement upon "high order First Amendment rights" (A. 170).

D. *The regulations suffer from unconstitutional vagueness and overbreadth*

The rule against vagueness "requires that the regulation be drawn with sufficient specificity so that persons seeking to exercise First Amendment rights, as well as those attempting to enforce the regulation, will know definitely what is being prohibited."[24] Although we did not specifically attack the regulations on the ground of vagueness below, we here assert that the regulations are "vague or overly broad as construed and *applied,*" *Younger* v. *Harris,* —— U.S. ——, 91 S. Ct. 746, 752 fn. 4.

The court below reacted to the "ambiguity" of the regulations noting its inability to determine "which of the two rules questioned prohibit the activities engaged in by the

[24] Emerson, *The System of Freedom of Expression,* at 364 (Random House, 1970).

plaintiffs" (A. 169). The vice of vagueness has been worsened, if anything, by the Regents' concession of partial unconstitutionality of Rule 6.12 (Brief, p. 41). The regulations are unconscionably vague. Further they are as the court below found "unconstitutionally overbroad" (A. 171), *Elfbrandt* v. *Russell,* 384 U.S. 11 (1966).

E. *The regulations under attack must fall as simple licensing regulations*

The commercial solicitation prohibition contained in 6.11 permits the sale of "any publication authorized by an agency of a component institution" without specifying any guidelines to the agency head in determining whether to permit the distribution and sale of the publication. The non-commercial solicitation prohibition contained in 6.12 permits solicitations with the approval of the institutional head when such solicitations are "for solicitation or fund raising for the needy or suffering, relief of the poor, or for public benevolent purposes . . . " We are left to surmise what constitute "public benevolent purposes" as are the institutional heads who are charged with the administration of this regulation. In both instances the regulations confer uncontrolled discretion upon the institutional head to grant or withhold the privilege. Thus the regulations are invalid on their face because they make enjoyment of the constitutional guarantee contingent upon the will of the institutional head, *Staub* v. *Baxley,* 355 U.S. 313 (1958).

CONCLUSION

Appellees respectfully submit that if jurisdiction is accepted the judgment of the court below should be affirmed in all respects.

Respectfully submitted,

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July 1971

BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM *v.* NEW LEFT EDUCATION PROJECT ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

No. 70-55. Argued December 6, 1971—Decided January 24, 1972

Three-judge district court was improperly convened under 28 U. S. C. § 2281 to consider constitutionality of appellant's rules for campus distribution of certain kinds of literature and for dues solicitation from members of political organizations since challenged rules do not have statewide applicability or effectuate statewide policy but affect only the few of the State's higher education institutions that are under appellant's jurisdiction; and the appeal from that court's judgment should therefore have been taken to the Court of Appeals and not this Court. Pp. 542–545.

326 F. Supp. 158, vacated and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, MARSHALL, and BLACKMUN, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 545. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the case.

W. O. Shultz II, Assistant Attorney General of Texas, argued the cause for appellant. With him on the brief were *Crawford C. Martin,* Attorney General, *Nola White,* First Assistant Attorney General, *Alfred Walker,* Executive Assistant Attorney General, and *J. C. Davis, Pat Bailey,* and *James C. McCoy,* Assistant Attorneys General.

David R. Richards argued the cause for appellees. With him on the brief was *Melvin L. Wulf.*

MR. JUSTICE WHITE delivered the opinion of the Court.

This case comes here on direct appeal from the ruling of a three-judge court declaring unconstitutional and enjoining enforcement of two sections of the Rules and

Regulations of appellant Board of Regents of the University of Texas System. 326 F. Supp. 158 (1970). We postponed consideration of our jurisdiction to a hearing on the merits. 401 U. S. 935 (1971). For reasons explained below, we have concluded that we lack jurisdiction of this appeal.

This litigation began when the Board of Regents sued the New Left Education Project and certain individuals in a Texas court. In that suit, the Regents sought to restrain defendants from distributing a newspaper and making either commercial or noncommercial solicitations on the Austin campus of the University of Texas except in compliance with appellant's rules. Defendants countered by bringing this federal suit to enjoin further state court proceedings on the ground that the rules that the Regents sought to enforce abridged defendants' First Amendment rights. A three-judge court met and determined that it was properly convened pursuant to 28 U. S. C. § 2281. It then permitted certain other organizations and individuals, including appellees here, to join the suit as plaintiffs and dismissed the action as to those involved in the state court adjudication. Thereafter, the court granted summary judgment in favor of appellees, declaring unconstitutional and permanently enjoining enforcement of two rules, Regents' Rules & Regs., c. VI, pt. 1, §§ 6.11, 6.12 (App. 173), governing the campus distribution of certain kinds of literature and the solicitation of dues from members of political organizations.

We have jurisdiction to review directly the lower court's order granting an injunction only if the case was one required to be heard and determined by a three-judge court. 28 U. S. C. § 1253. Such a court is required where the challenged statute or regulation, albeit created or authorized by a state legislature, has statewide application or effectuates a statewide policy. But a single judge, not a three-judge court, must hear the case where the statute or regulation is of only local import. *Moody*

v. *Flowers*, 387 U. S. 97 (1967); *Rorick* v. *Board of Commissioners*, 307 U. S. 208 (1939); *Ex parte Public National Bank*, 278 U. S. 101 (1928); *Ex parte Collins*, 277 U. S. 565 (1928). This rule achieves the congressional purpose of saving statewide regulatory legislation from invalidation through ordinary federal court equity suits, minimizes the burden that the three-judge court places upon the federal judiciary, and avoids unduly expanding the Court's carefully limited appellate jurisdiction. *Phillips* v. *United States*, 312 U. S. 246, 250 (1941). Thus, the "term 'statute' in § 2281 does not encompass local ordinances or resolutions," *Moody* v. *Flowers*, *supra*, at 101, nor does it include a state statute having only a local impact, even if administered by a state official. *Rorick* v. *Board of Commissioners*, *supra*.

Appellant Board of Regents was created by the Texas Legislature and is charged with governing those educational institutions in the University of Texas System. Texas Rev. Civ. Stat. Ann., Art. 2585 (1965). This governance, which specifically includes a rulemaking power, *ibid.*, extends to but three of the 23 four-year state colleges and universities listed in the Higher Education Coordinating Act of 1965, *id.*, Art. 2919e–2, § 2 (Supp. 1970–1971): the University of Texas at Austin, El Paso, and Arlington.[1] In addition to the 20 senior colleges and universities for which appellant bears no responsibility, Texas has at least 31 public junior colleges that are not within the University of Texas System. *Ibid.* It is true that the Board of Regents governs numerous medical and other specialized schools and branches, *id.*, Arts. 2603e to 2603i, 2606b to 2606d, but these are only some of the specialized institutions that Texas denominates as agencies of higher education.

[1] Appellant also mentions the University of Texas at San Antonio and Permian Basin but does not take issue with appellees' contention that these schools are merely in the planning stage (Brief for Appellees 2 n. 1).

Id., Art. 2919e–2, §§ 2 (e)–(g) (Supp. 1970–1971). It is therefore apparent that the Regents' rulemaking power and the rules at issue in this litigation extend to but a fraction of the campuses in the Texas system of higher public education. These rules can scarcely be described as matters of statewide concern or expressions of a statewide policy when a large percentage of Texas colleges and universities are unaffected by them and could not be affected by any pronouncement that a federal court might make on their constitutionality. There is no suggestion or indication of any kind that the Regents' rules are similar to those for other schools or are required by or express statewide policy.[2]

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[2] It has long been settled that a three-judge court is proper even in a suit against a local official, although localized in his geographic activities and mode of his selection, when he is engaged in enforcing a policy of statewide application whose constitutionality is challenged. *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89 (1935); *Rorick* v. *Board of Commissioners*, 307 U. S. 208, 212 (1939). The thrust of our more recent decision in *Alabama State Teachers Assn.* v. *Alabama Public School and College Authority*, 393 U. S. 400 (1969), is to the same effect. The issue there was a legislative direction to the Alabama Public School and Housing Authority to issue bonds for the construction of a public university in Montgomery, Alabama. Appellants challenged that action, although having a local impact, as expressive of an official, statewide policy to maintain a racially identifiable, dual system of education, and the District Court denied relief. The dissent on the merits from summary affirmance, disagreeing with Justice Harlan's dissent on jurisdictional grounds, agreed that a statewide policy was sufficiently implicated to sustain the jurisdiction of the three-judge court and the direct appeal here. *Board of Visitors* v. *Norris*, *post*, p. 907, aff'g 327 F. Supp. 1368 (ED Va. 1971), rests upon the same basis. In *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637 (1950), the Court entertained an appeal from the judgment of a three-judge District Court upholding an Oklahoma statute providing that Negroes, though admissible to white graduate schools, must get that education on a segregated basis.

Nothing in the record before us in this case indicates that the regulations challenged here represent general state policy, reflect a

The situation here is comparable to that in *Moody* v. *Flowers, supra,* where we held that three-judge courts were improperly convened to consider challenges to a state statute applying to a particular county and to a county charter based upon a state statute. The fact that several campuses over which the Board of Regents has jurisdiction are located in different parts of the State does not in our view make their rules of general applicability for the purpose of 28 U. S. C. § 2281. These rules, applying only to some of the higher educational institutions of the State, are of limited significance and do not partake of the quality and dignity of those state statutes or policies that three-judge courts were designed to consider. We are persuaded that a contrary view of this case would be inconsistent with our oft-repeated admonition that the three-judge court statute is to be strictly construed. *E. g., Allen* v. *State Board of Elections,* 393 U. S. 544 (1969); *Phillips* v. *United States,* 312 U. S., at 251.

Since the three-judge court was improperly convened, appeal lies not here but to the Court of Appeals for the Fifth Circuit. So that appellant may be able, if it desires, to perfect a timely appeal, we vacate the judgment below and remand the case with instruction that the court enter a fresh decree. *Phillips* v. *United States, supra,* at 254.

Judgment vacated and remanded.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, dissenting.

When I authored *Moody* v. *Flowers,* 387 U. S. 97, I thought I was writing a chapter on federalism within

statutory command, or apply to more than a fraction of the Texas higher educational institutions. It is thus difficult to understand the dissent's reliance on the *Alabama, Norris,* and *McLaurin* cases.

a State. Cities, counties, and the State as a whole constitute that federalism. The three-judge-court statute, 28 U. S. C. § 2281, speaks of "the enforcement, operation or execution of any State statute." A city ordinance or a county regulation does not meet that requirement and so the county regulations involved in *Moody* did not satisfy the statute though enacted by the State. If the source of the authority is state action, the statute is presumably satisfied, since normally, of course, state laws have an impact on activities in every city and every county. But where a state law is not of "statewide concern" but involves only "legislation affecting a locality" (*Rorick* v. *Board of Commissioners*, 307 U. S. 208, 213), then the policy of 28 U. S. C. § 2281 is deemed not served.

But a State's university system, involving, as does this one, 17 institutions, is plainly of "statewide concern" even though not every county has a university.[1]

In addition to its supervision of the University of Texas at Austin, Texas Rev. Civ. Stat. Ann., Art. 2584 *et seq.*, and the other institutions included in the 17 that are in the state university system,[2] the Board of Regents also oversees a number of other major institutions of higher education within Texas' university and college system: University of Texas at El Paso, *id.*, Art. 2633, University of Texas at Arlington, *id.*, Art. 2620a, University of

[1] During oral argument, counsel for appellant indicated that its authority extended over some "17 component institutions in the system," stretching from El Paso on the far western tip of the State, to Galveston on the Gulf Coast, and from San Antonio in the south to Dallas in the north. Tr. of Oral Arg. 6–7. "[A]t the University of Texas at Austin alone," counsel told us, "there are 40,000 students, and over 7,000 employees on a 265-acre campus. When you include all the other campuses and institutions, I'm hard put to say how many people are involved; but many, many thousands." *Id.*, at 10.

[2] See n. 1, *supra*.

Texas at San Antonio, *id.*, Art. 2606c–3, University of Texas at Dallas, *id.*, Art. 2606c–3.1, University of Texas of the Permian Basin, *id.*, Art. 2606c–4, Institutes for Urban Studies in the Dallas-Ft. Worth area and in Houston, *id.*, Art. 2606d, as well as other institutions of learning. *E. g., id.*, Art. 2585d (3).

The matter involves more than state "legislation affecting a locality": it concerns a statewide university system scattered across the State and serving the educational needs of those from every city, from every county, who seek undergraduate or graduate education.[3]

Since the case is properly here, I would reach the merits.

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[3] That a "statewide concern" sufficient to require a three-judge court is present is evidenced by *Alabama State Teachers Assn.* v. *Alabama Public School and College Authority*, 393 U. S. 400 (1969), a case of recent vintage which the Court must overrule to reach its result today. There, we sustained a three-judge-court action dealing with state bonding authority for a single college in a single town. See also *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637 (1950) (three-judge court required for action relating to single state graduate school). The present case is an even stronger one for the convention of a three-judge court because the rules in issue touch upon the freedom of expression in colleges and universities in all four corners of the State of Texas.

And see *Board of Visitors* v. *Norris*, *post*, p. 907, aff'g 327 F. Supp. 1368 (ED Va. 1971), decided about three months ago. There, the three-judge court struck down as unconstitutional a single item in a state act dealing with but one of the State's colleges. This Court unanimously affirmed that judgment.

Alabama State Teachers Assn., *McLaurin*, and *Norris* did not, as is suggested by the majority, depend upon the existence of a pervasive state policy of segregation extending beyond the educational institutions there involved. The statewide concern which justified the convention of the three-judge courts in those cases, cf. *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89 (1935), was the unconstitutional manner in which state institutions, serving the entire State, were being operated. That same kind of operation of statewide institutions is alleged in the present case.